DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-138
Title: BG Group plc, Petitioner
v.
Republic of Argentina
Docketed: July 31, 2012
Linked with 11A1134
Lower Ct: United States Court of Appeals for the District of Columbia Circuit
Case Nos.: (11-7021)
Decision Date: January 17, 2012
Rehearing Denied: March 15, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
May 31 2012	Application (11A1134) to extend the time to file a petition for a writ of certiorari from June 13, 2012 to July 13, 2012, submitted to The Chief Justice.
Jun 1 2012	Application (11A1134) granted by The Chief Justice extending the time to file until July 13, 2012.
Jul 3 2012	Application (11A1134) to extend further the time to file a petition for a writ of certiorari from July 13, 2012 to July 27, 2012, submitted to The Chief Justice.
Jul 6 2012	Application (11A1134) granted by The Chief Justice extending the time to file until July 27, 2012.
Jul 27 2012	Petition for a writ of certiorari filed. (Response due August 30, 2012)
Aug 20 2012	Order extending time to file response to petition to and including October 1, 2012.
Aug 27 2012	Motion for leave to file amicus brief filed by American Arbitration Association.
Aug 29 2012	Motion for leave to file amici brief filed by Professors and Practitioners of Arbitration Law.
Aug 30 2012	Motion for leave to file amicus brief filed by United States Council for International Business.
Aug 30 2012	Motion for leave to file amicus brief filed by AWG Group Limited.
Oct 1 2012	Brief of respondent Republic of Argentina in opposition filed.
Oct 17 2012	DISTRIBUTED for Conference of November 2, 2012.
Oct 17 2012	Reply of petitioner BG Group plc filed. (Distributed)
Nov 5 2012	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 10 2013	Brief amicus curiae of United States filed.
May 21 2013	DISTRIBUTED for Conference of June 6, 2013.

May 21 2013 Supplemental brief of petitioner BG Group PLC filed. (Distributed)

Jun 3 2013 Letter of June 3, 2013, from counsel for petitioner received. (Distributed)

Jun 5 2013 Letter of June 5, 2013, from counsel for respondent received. (Distributed)

Jun 10 2013 Motion for leave to file amicus brief filed by American Arbitration Association GRANTED.

Jun 10 2013 Petition GRANTED.

Jun 10 2013 Motion for leave to file amici brief filed by Professors and Practitioners of Arbitration Law GRANTED.

Jun 10 2013 Motion for leave to file amicus brief filed by AWG Group Limited GRANTED.

Jun 10 2013 Motion for leave to file amicus brief filed by United States Council for International Business GRANTED.

Jun 14 2013 The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 26, 2013.

Jun 14 2013 The time to file respondent's brief on the merits is extended to and including October 25, 2013.

Jun 14 2013 Petitioner will file the reply brief on or before November 15, 2013.

Jul 26 2013 Motion to dispense with printing the joint appendix filed by petitioner BG Group Plc.

Aug 9 2013 Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.

Aug 14 2013 Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.

Aug 26 2013 Brief of petitioner BG Group Plc filed.

Aug 30 2013 Brief amici curiae of Professors and Practitioners of Arbitration Law filed.

Aug 30 2013 Brief amicus curiae of United States Council for International Business filed.

Sep 3 2013 Brief amicus curiae of United States filed.

Sep 3 2013 Brief amicus curiae of American Arbitration Association filed.

Sep 17 2013 SET FOR ARGUMENT ON Monday December 2, 2013.

Sep 17 2013 CIRCULATED

Sep 19 2013 Record from U.S.D.C. for District of Columbia is electronic.

Oct 7 2013 Motion to dispense with printing the joint appendix filed by petitioner GRANTED.

Oct 19 2013 Record from U.S.C.A. for District of Columbia Circuit is electronic.

Oct 25 2013 Brief of respondent Republic of Argentina filed. (Distributed)

Oct 25 2013 Letter from counsel for respondent Republic of Argentina proposing a lodging of non-record materials filed. (Distributed)

Nov 1 2013 Brief amicus curiae of The Republic of Ecuador filed. (Distributed)

Nov 1 2013 Brief amici curiae of Practitioners and Professors of International Arbitration filed. (Distributed)

Nov 1 2013 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Nov 15 2013 Reply of petitioner BG Group Plc filed. (Distributed)

Nov 18 2013 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Dec 2 2013 Argued. For petitioner: Thomas C. Goldstein, Washington, D. C. For United

States, as amicus curiae: Ginger D. Anders, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondent: Jonathan I. Blackman, New York, N. Y.

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

No. 12-138

Supreme Court, U.S.
FILED
JUL 27 2012
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BG GROUP PLC,

Petitioner,

v.

REPUBLIC OF ARGENTINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In disputes involving a multi-staged dispute resolution process, does a court or instead the arbitrator determine whether a precondition to arbitration has been satisfied?

PARTIES TO THE PROCEEDING BELOW

The case caption contains the names of all parties who were parties in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioner states that it has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner BG Group Plc respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals vacating the final arbitral award (Pet. App. 1a) is reported at 665 F.3d 1363. The opinions of the district court recognizing and enforcing the award (Pet. App. 21a) and refusing to vacate the award (Pet. App. 58a) are reported at 764 F. Supp. 2d 21 and 715 F. Supp. 2d 108. The arbitral award (Pet. App. 92a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 2012. A timely petition for panel rehearing or rehearing en banc was denied on March 15, 2012. *See* Pet. App. 307a. The Chief Justice subsequently extended the time to file this petition to and including July 27, 2012. No. 11A1134. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 10(a)(4) of the Federal Arbitration Act, 9 U.S.C. § 10(a)(4), provides:

10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

* * * *

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Section 207 of the Federal Arbitration Act, 9 U.S.C. § 207, provides:

207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

STATEMENT

Congress enacted the Federal Arbitration Act (FAA) "'[t]o overcome judicial resistance to arbitration' and to declare 'a national policy favoring arbitration of claims that parties contract to settle in that manner.'" *Vaden v. Discover Bank*, 556 U.S. 49, 58 (2009) (citations omitted). Time and again, this Court has been required to intervene to overcome continuing judicial resistance to arbitration and the FAA. In particular, the Court has repeatedly reinforced that disputes over arbitration are generally for arbitrators—not courts—to resolve. The D.C. Circuit's decision in this case requires this Court's intervention once again.

This case presents the question whether a court or instead an arbitral tribunal determines if a party is required to pursue some other form of dispute resolution (such as negotiation or litigation) as a prerequisite to arbitration under a multi-staged arbitration clause. This Court has held that "issues of procedural arbitrability," such as whether "conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (citations omitted). Thus, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 555–59 (1964), held that an arbitrator, not a court, decides whether the pre-arbitral steps in a staged dispute resolution clause have been completed.

On that basis, the First, Sixth, Seventh, and Eighth Circuits hold that the arbitrator, not a court, must determine whether a precondition to arbitration in a multi-staged arbitration clause has been satisfied. In

conflict with those decisions, in this case the D.C. Circuit joined the Eleventh Circuit in holding that a court determines whether a party complied with a precondition to arbitration. The D.C. Circuit then exercised that power, overruling the arbitrators' contrary interpretation of the precondition to arbitration in the parties' agreement and vacating the arbitral award rendered in favor of petitioner.

A. Legal Background

In 1990, respondent the Republic of Argentina (Argentina) entered into a bilateral investment treaty with the United Kingdom. *See* Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, Arg.–U.K., Dec. 11, 1990, 1765 U.N.T.S. 33 (the Treaty). The Treaty grants various protections to nationals of the United Kingdom investing in Argentina, and vice-versa.

To safeguard those protections, the Treaty established a "two-tiered system of dispute resolution." Pet. App. 23a-24a. The signatories contemplated that Argentina would permit a U.K. investor challenging Argentina's compliance with the Treaty to submit the dispute to arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL) if the investor had first submitted the dispute to a "competent tribunal" in Argentina. Litigation in Argentina was required to continue for a period of eighteen months; however, the investor's right to commence arbitration was

not contingent on the completion of that litigation.[1]

---

1. Article 8 of the Treaty states, in part:

> (1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled shall be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.
>
> (2) The aforementioned disputes shall be submitted to international arbitration in the following cases:
>
> > (a) if one of the Parties so requests, in any of the following circumstances:
> >
> > > (i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;
> >
> > > (ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute; . . . .
>
> (3) Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:
>
> > (a) the International Centre for the Settlement of Investment Disputes . . . ; or
> >
> > (b) an international arbitrator or *ad hoc* arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

Under the UNCITRAL Rules, challenges to arbitral jurisdiction are resolved by the arbitrators. *See* United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (1976), art. 21(1), G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976) ("The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.").

The Treaty provides that its terms shall be construed in accordance with international law, which includes the Vienna Convention on the Law of Treaties (Vienna Convention).[2] *See* Treaty, art. 8(4). Under the Vienna Convention, a treaty shall not be applied in a manner that produces an absurd or unreasonable result. *See* Vienna Convention, art. 32(b).

> If after a period of three months from written notification of the claim there is no agreement to one of the above alternative procedures, the Parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The arbitral decision shall be final and binding on both Parties.

See Pet. App. 94a–96a.

2. May 23, 1969, 1155 U.N.T.S. 331. The United Kingdom and Argentina have both ratified the Vienna Convention. *See* Vienna Convention on the Law of Treaties: Status, United Nations Treaty Collection, http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en (last visited July 26, 2012).

B. Factual Background And Arbitral Decision

Petitioner BG Group Plc (BG) is a U.K. company. In the early 1990s, BG made a major investment in the Argentinean natural gas distribution sector. As the arbitral tribunal explained, petitioner's investment was predicated on the regulatory framework that Argentina had put in place for the specific purpose of inducing foreign investors, including petitioner, to invest in the country. Pet. App. 101a–117a, 239a–242a.

The arbitral tribunal found that, in 2002, Argentina adopted certain measures that had the purpose and effect of eviscerating the regulatory framework established to induce petitioner's investment. Pet. App. 232a–242a. Among other things, Argentina declared that the tariffs that petitioner's gas distribution company was entitled by law to collect in U.S. dollars would be converted into Argentinean pesos at a rate of one peso per dollar, at a time when the market exchange rate ranged between three and four pesos to the dollar. *Id.* at 126a–129a, 241a. At the same time, however, petitioner's debt obligations remained fixed at their full foreign currency value, even while its tariff revenue plummeted. *Id.*

Concurrently, Argentina adopted a scheme to stymie any legal challenge to its actions. As the arbitral tribunal explained, Argentina restricted access to its court system and adopted punitive measures against investors attempting to file suit. Pet. App. 165a–171a. Most important here, Argentina adopted legislative decrees providing that licensees that sought redress in Argentinean courts would be excluded from any negotiations designed to mitigate the effects of Argentina's measures. *Id.*

Because, as the arbitral tribunal ultimately found, petitioner's investment was virtually destroyed as a result of Argentina's measures, and because Argentina threatened litigants with serious penalties if they challenged the Government's measures, petitioner proceeded immediately to arbitration. Petitioner argued that its obligation to litigate first in respondent's courts for eighteen months was excused by, *inter alia*, Argentina's coercive actions.

Because the Treaty does not set a legal "seat" of arbitration, the parties agreed that the seat would be Washington, D.C. The members of the arbitral tribunal were eminent in the fields of public international law and international arbitral procedure and jurisdiction: Professor Albert Jan van den Berg, Professor of Law (Arbitration Chair) at Erasmus University, Rotterdam (appointed by petitioner); Professor Alejandro Garro, an Argentinean national and Senior Research Scholar, Parker School of Foreign and Comparative Law, Columbia University (appointed by respondent); and, as presiding arbitrator selected by consent of the parties, Mr. Guillermo Aguilar-Alvarez, former Principal Legal Counsel for Mexico in the negotiation of the North American Free Trade Agreement (NAFTA) and current lecturer in International Investment Law at Yale Law School.

Following several rounds of written submissions, witness statements and expert reports, the arbitral tribunal held an eight-day hearing in July 2006. Argentina argued, *inter alia*, that arbitration under the Treaty could only begin after a dispute had been submitted to Argentinean courts for eighteen months. In a unanimous, 139-page award dated December 24, 2007, the arbitrators disagreed. Pet. App. 165a–171a.

The arbitral tribunal acknowledged that, as enacted, the Treaty ordinarily requires litigation in Argentina for eighteen months before arbitration may begin. The tribunal, however, interpreted the Treaty in light of settled international law principles to excuse compliance with that requirement because Argentina had itself taken extraordinary measures to prevent access to its courts.

The tribunal began by recognizing that "the regular operation of the courts in Argentina came under significant pressure" following the passage of regulations "whose *purpose* was to bar recourse to the courts by those whose rights were felt to be violated." Pet. App. 166a (emphasis added). The tribunal held that, by these acts, Argentina had "prevent[ed] judicial adjudication and enforcement of property rights." *Id.* at 168a. Accordingly, the tribunal found it "fitting to examine the reasonableness of the expectation that judicial remedies should have been exhausted at a time where the Executive Branch was seeking to prevent any judicial interference" with the measures Argentina had adopted against foreign investors. *Id.* at 169a.

The arbitral tribunal found that, in these circumstances, the eighteen-month litigation precondition was excused under the principles of international law that govern construction of the Treaty. It reasoned that because Argentina had "directly interfere[ed] with the normal operation of its courts" and penalized any investor that sought judicial redress, requiring petitioner to litigate as a precondition to arbitration would produce an "absurd and unreasonable result" in contravention of the governing principles of the Vienna Convention. *Id.* at 165a–166a, 170a–171a. The tribunal reasoned:

> Where recourse to the domestic judiciary is unilaterally prevented or hindered by the host State, any such interpretation would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention, allowing the State to unilaterally elude arbitration . . . .

Id. at 165a–166a. The tribunal thus concluded that petitioner's failure to litigate in Argentinean courts for eighteen months was not a bar to the exercise of arbitral jurisdiction:

> [T]he Tribunal notes that a serious problem would loom if admissibility of Claimant's claims were denied, thus allowing Respondent at the same time to:
>
> a) restrict the effectiveness of domestic judicial remedies as a means to achieve the full implementation of the Emergency Law and its regulations;
>
> b) insist that the Claimant go to domestic courts to challenge the very same measures; and
>
> c) exclude from the renegotiation process any licensee that does bring its grievance to local courts.

Id. at 171a.

On the merits, the tribunal held that Argentina had "entirely altered the legal and business environment"

and had "reversed commitments towards BG," thus violating Argentina's obligations under the Treaty. *Id.* at 241a–242a. The tribunal awarded petitioner US$185.3 million in damages, plus interest and costs.

Petitioner was not alone in commencing arbitration against Argentina over these measures—over twenty-five foreign investors did the same. *See, e.g.*, *Argentine Republic v. Nat'l Grid Plc*, 637 F.3d 365 (D.C. Cir. 2011). Many of those proceedings have generated substantial awards in favor of the investor claimants, a number of whom are U.S. nationals. However, Argentina has refused to satisfy the awards against it, leading the United States, in March 2012, to suspend Argentina's designation as a beneficiary developing country under the U.S. Generalized System of Preferences. *See* Proclamation No. 8788, 77 Fed. Reg. 18,899, 18,899 (Mar. 29, 2012) ("I have determined . . . that it is appropriate to suspend Argentina's designation as a GSP beneficiary developing country because it has not acted in good faith in enforcing arbitral awards in favor of United States citizens . . . ."). Similarly, Argentina continues to flout the billions of dollars in judgments issued against it by U.S. courts. *See, e.g.*, *NML Capital, Ltd. v. Republic of Argentina*, 680 F.3d 254, 256 n.4 (2d Cir. 2012) (noting "the special place of the Republic in the history of the law and diplomacy of default").

C. The District Court's Decision

Respondent moved to vacate the award in the U.S. District Court for the District of Columbia. Respondent argued, *inter alia*, that the court should determine *de novo* whether petitioner was required to institute litigation in the Argentinean courts. The district court disagreed, holding that the arbitrators, rather than a court, had

jurisdiction to determine whether petitioner was required to comply with the precondition to arbitration in the Treaty. Pet. App. 79a–80a.

The court then applied the deferential standard of review in Section 10(a)(4) of the FAA. *See* 9 U.S.C. § 10(a)(4) (permitting vacatur of an award when an arbitral tribunal has exceeded its power). The court examined whether the arbitral tribunal "'strayed from interpretation and application of the agreement and effectively dispensed [its] own brand of industrial justice.'" Pet. App. 78a (quoting *Stolt-Nielsen S.A. v. Animal-Feeds Int'l Corp.*, 130 S. Ct. 1758, 1767 (2010) (alterations omitted)). The court found no excess of power on the part of the tribunal. It held that the arbitral tribunal correctly turned to the applicable principles of international law governing the interpretation of the Treaty—the Vienna Convention—and found nothing unreasonable in the arbitrators' decision. Pet. App. 79a–80a.

The district court further rejected Argentina's challenge to the substance of the tribunal's decision. "Argentina's attack on the validity of the Award is premised on nothing more than numerous assertions of error on the part of the arbitral tribunal," Pet. App. 88a, the court concluded. It therefore rejected respondent's petition to vacate the award and granted petitioner enforcement of the award. *Id.* at 89a, 56a–57a.

D. The Court of Appeals' Decision

On respondent's appeal, the D.C. Circuit reversed. Pet. App. 2a. The court of appeals recognized that Argentina's jurisdictional challenge to the award turned not on whether an arbitration agreement existed, but on

whether BG had satisfied a precondition to arbitration found in a valid arbitration clause. *See id.* at 3a, 15a. The D.C. Circuit held, however, that it fell to a U.S. court, and not the arbitral tribunal, to determine whether petitioner's failure to comply with the precondition to arbitration prohibited it from commencing arbitration. *See id.* at 15a.

The court of appeals acknowledged that in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), this Court had rejected the argument that a court should decide whether a union had satisfied a precondition to arbitration by exhausting a grievance procedure. Instead, this Court held that "[d]oubts [as to] whether [the grievance procedures] have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate" was for the arbitrator to decide. *Id.* at 557. The court of appeals nonetheless held that the rule of *John Wiley* is narrowly confined to the specific context of industrial labor disputes. Pet. App. 16a–17a. This Court's reasoning in *John Wiley* was inapposite, the D.C. Circuit also believed, because in this case the Treaty "explicitly *requires* judicial proceedings prior to arbitration." *Id.* at 17a. Moreover, the court found that the facts relevant to the question of arbitrability in the instant case do not "grow out of the dispute," as they did in *John Wiley*. *See id.* at 17a–18a.

The D.C. Circuit further did not dispute that in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), this Court relied on *John Wiley* in holding that an arbitrator, not a court, should decide whether arbitration procedures were timely invoked within the terms of an arbitration agreement. This Court relied on the settled principle that, "in the absence of an agreement to the contrary, . . . issues of procedural arbitrability, *i.e.*,

whether prerequisites such as time limits, notice, laches, estoppel, and *other conditions precedent to an obligation to arbitrate* have been met, are for the arbitrators to decide." *Id.* at 85 (citation omitted and emphasis altered).

In a footnote, the court of appeals distinguished *Howsam* on the ground that in that case "the question of arbitrability arose from a rule" governing the arbitral procedure. Pet. App. 18a n.6. The court of appeals opined that *Howsam* has no application to preconditions to arbitration found not in arbitral rules but in an instrument containing the arbitral agreement (the Treaty) itself. *Id.* The court further justified its departure from *Howsam* on the theory that in *Howsam* the question of arbitrability was intertwined with the facts underlying the substantive dispute, making the tribunal comparatively more expert in resolving the jurisdictional challenge than a court. The court of appeals believed that it, rather than the arbitral tribunal comprised of experts in international law and arbitration, had more expertise to determine the meaning and effect of the Treaty between the United Kingdom and Argentina. *Id.*

The court of appeals also recognized that the UNCITRAL Rules selected by the parties explicitly confer on the arbitral tribunal jurisdiction to determine challenges to its own jurisdiction. Pet. App. 13a–14a. It further recognized that under *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995), "the UNCITRAL Rules grant the arbitrator the power to determine issues of arbitrability." Pet. App. 14a. But the court of appeals nonetheless held that the incorporation of those Rules was subject to a "temporal limitation": the Rules were

not triggered until after the precondition to arbitration in the Treaty had been satisfied and the arbitration properly commenced. *Id.*

The court of appeals accordingly concluded that it had the power to determine, *de novo*, the effect of petitioner's failure to litigate in Argentinean courts for eighteen months prior to commencing arbitration. *Id.* In exercising that power, the court declared the arbitral award invalid under the Treaty because petitioner had not first instituted litigation in the Argentinean courts. *See id.* at 18a–19a. In reaching that conclusion, the court did not consider the law applicable to the interpretation of the Treaty: it neither engaged in a choice-of-law analysis nor looked to the Treaty's choice-of-law clause (art. 8(4)). As a result, and in contrast to the approach of the arbitral tribunal, the court did not apply the Vienna Convention. Nor did the court take into account the effect of the decrees enacted by Argentina—which punished licensees that commenced litigation in Argentinean courts—on petitioner's obligation to bring suit prior to commencing arbitration.

The court of appeals denied panel rehearing and rehearing en banc. Pet. App. 307a.

REASONS FOR GRANTING THE PETITION

Although the parties to this case voluntarily committed themselves to resolving their investment disputes through arbitration, the court of appeals claimed for itself the authority to decide *de novo* the critical question of whether petitioner complied with the terms of the parties' agreement in initiating arbitration. In so holding, the D.C. Circuit defied this Court's repeated holdings that it is for arbitrators, not courts, to decide whether preconditions to arbitration have been fulfilled or excused. That resistance to this Court's arbitration precedents and Congress's policy favoring arbitration requires this Court's correction.

I. The D.C. Circuit's Decision Contravenes The Decisions Of This Court And Undermines The Strong Federal Policy Favoring Arbitration.

A. The FAA Establishes A Federal Policy In Favor Of Arbitration.

The FAA was enacted in 1925 "in response to widespread judicial hostility to agreements to arbitrate." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011); *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). As this Court has frequently recognized, the FAA establishes an "emphatic federal policy in favor of arbitral dispute resolution," which "applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 631 (1985); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

That federal policy is most frequently implicated in two different circumstances: when a party seeks at the outset to avoid arbitration, and when a party petitions to vacate an adverse award. In both instances, the FAA and this Court's precedents direct courts to proceed "with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone*, 460 U.S. at 24. As a result, courts are directed to resolve "any doubts concerning the scope of arbitral issues . . . in favor of arbitration," *id.*, and to vacate awards only in cases of "egregious departures from the parties' agreed-upon arbitration" or "extreme arbitral conduct," *Hall St. Assocs.*, 552 U.S. at 586. *See also AT&T Mobility*, 131 S. Ct. at 1752 ("review under § 10 [of the FAA] focuses on misconduct rather than mistake"). Nevertheless, in spite of that clear directive, the lower courts have frequently resisted the enforcement of arbitration agreements and resulting awards, and this Court has repeatedly been forced to correct that error. *See, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (per curiam) ("The West Virginia court's interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court.").

B. The D.C. Circuit's Decision Is Contrary To This Court's Precedents And The Pro-Arbitration Policies Of The FAA.

In this case, the D.C. Circuit departed from this Court's precedents, with serious consequences. Arbitration agreements increasingly call for the parties to attempt other means of dispute resolution—ranging from good faith discussions to mediation—prior to commencing arbitration. Indeed, "[i]n most cases, international

arbitration is not used in isolation; its use in combination with ADR mechanisms is the most common option." PricewaterhouseCoopers, *International Arbitration: Corporate Attitudes and Practices 2006* at 5 (2006)[3] (finding also that 73% of corporations surveyed prefer international arbitration as a means for resolving cross-border disputes).

The International Bar Association has thus explained that it is "common for dispute resolution clauses in international contracts to provide for negotiation, mediation or some other form of alternative dispute resolution as preliminary steps before arbitration." International Bar Association, *IBA Guidelines for Drafting International Arbitration Clauses* ¶ 86 (2010);[4] *see also* Jason File, *United States: Multi-Step Dispute Resolution Clauses*, IBA Legal Prac. Division: Mediation Committee Newsl., July 2007, at 33 (observing that "'multi-step' dispute resolution clauses have become popular additions to domestic and international commercial contracts in the United States"); *Considering Alternatives to Litigation*, Corporate Legal Times, January 2002, at 66 (surveying in-house counsel at major U.S. corporations, including Edison International, Apple Computer, and Conoco Inc., who noted the frequent and increasing use of staged arbitration clauses).

The use of staged dispute resolution procedures is not limited to commercial contracts: almost all bilateral investment treaties include staged grievance procedures,

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3. *Available at* http://www.arbitrationonline.org/docs/IAstudy_2006.pdf.

4. *Available at* http://www.ibanet.org/ENews_Archive/IBA_27October_2010_Arbitration_Clauses_Guidelines.aspx.

requiring either a period of negotiation, mediation, or litigation before the commencement of arbitration,[5] including a significant number of trade and investment treaties entered into by the United States,[6] as well as the

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5. *See, e.g.*, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments, U.K.–Egypt, art. 8(1), June 11, 1975, 32 U.N.T.S. 1032 (requiring, as a precondition to arbitration, that the parties engage in a three-month settlement period "through pursuit of local remedies, through conciliation or otherwise"); Treaty between the Federal Republic of Germany and the Republic of Argentina on the Promotion and Reciprocal Protection of Investments, Ger.–Arg., art. 10, Apr. 9, 1991, 1910 U.N.T.S. 198 (requiring, as a precondition to arbitration, that the dispute be submitted to the competent courts of the host State for eighteen months). *See generally* Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* 247 (2008) ("Nearly all consent clauses in treaties provide for certain procedures that must be adhered to. A common condition for the institution of arbitration proceedings is that an amicable settlement has been attempted through consultations or negotiations. This requirement is subject to certain time limits ranging from three to twelve months. If no settlement is reached within that period, the claimant may proceed to arbitration.").

6. *See, e.g.*, 2012 U.S. Model Bilateral Investment Treaty arts. 23-24, *available at* http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf (providing for an escalated investor-state dispute resolution process, including consultations, a three-month notification period, and a six-month cooling-off period); Dominican Republic-Central America-United States Free Trade Agreement arts. 10.15-10.16, Aug. 5, 2004, Office of the U.S. Trade Representative, http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text (providing for an escalated investor-state dispute resolution process, including consultations, a three-month notification period, and a six-month cooling-off

NAFTA.[7]

By directing courts to decide *de novo* whether those preconditions have been satisfied, and to vacate the results of an otherwise fair arbitration proceeding if they disagree with the arbitrators' resolution of that question, the D.C. Circuit has provided a new avenue for disappointed parties to an arbitration to seek to avoid its results, a new means for courts to second-guess and set aside arbitral awards, and an inevitable source of litigation and delay in resolving disputes subject to arbitration. Those consequences are utterly at odds with this Court's precedents and threaten to send users of arbitration to more hospitable jurisdictions outside the United States.

This Court's precedent provides that a dispute regarding compliance with a multi-staged arbitration procedure must be decided by the arbitrators.[8] In both

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period); United States-Korea Free Trade Agreement, U.S.-S. Kor., arts. 11.15-11.16, June 30, 2007, Office of the U.S. Trade Representative, http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text (providing for an escalated investor-state dispute resolution process, including consultations, a three-month notification period, and a six-month cooling-off period).

7. *See* North American Free Trade Agreement arts. 1118-20, Dec. 17, 1992, 32 I.L.M. 289 (1993) (providing for an escalated investor-state dispute resolution process, including consultations, a three-month notification period, and a six-month cooling-off period).

8. That here the arbitration agreement appeared in a treaty, rather than a contract, does not change the analysis: the Treaty constitutes a standing offer from the State parties to arbitrate, which is accepted by the investor when it issues a demand for

John Wiley and *Howsam*, this Court addressed the division of labor between arbitrators and judges: absent contrary agreement, the "question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the 'question of arbitrability,' is 'an issue for judicial determination'"; all other challenges, including whether "conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." *Howsam*, 537 U.S. at 83, 85 (citations omitted); *see also John Wiley*, 376 U.S. at 557–58. In direct conflict with those precedents, however, the D.C. Circuit held that it is for a *court* to determine whether a party complied with the pre-arbitral stages of a multi-staged arbitration clause. That conclusion cannot be reconciled with this Court's decisions.

1. In *John Wiley*, this Court held that an arbitrator should decide whether the first two steps of a three-stage grievance procedure were completed, where those steps were prerequisites to arbitration. The dispute resolution procedure in *John Wiley* contemplated, first, a meeting between the aggrieved employee, the Union's steward, and a John Wiley manager; second, the submission of the grievance to a conference with designated representatives;

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arbitration. *See Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 392 (2d Cir. 2011) (noting that the difference between arbitration under a bilateral investment treaty and arbitration under a contract is "a distinction without a difference, since Ecuador, by signing the BIT [bilateral investment treaty], and Chevron, by consenting to arbitration, have created a separate binding agreement to arbitrate"); *see also* Kenneth J. Vandevelde, *Bilateral Investment Treaties* 434 (2010) ("While the host state's consent to arbitration typically is given in the BIT, the common practice is that the investor consents by submitting a claim to arbitration.").

and, third, arbitration if the grievance were not resolved through the preceding steps. *See John Wiley*, 376 U.S. at 556. John Wiley argued that it was not required to arbitrate because the Union had not followed the first two steps. *Id.*

This Court held that John Wiley's challenge was a matter for arbitration, explaining that "[d]oubts [as to] whether [the grievance procedures] have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration." *Id.* at 557. Having a court consider this issue would lead to a "curious" result in which "intertwined issues . . . growing out of a single dispute and raising the same question on the same facts had to be carved up between two different forums . . . ." *Id.*[9]

The D.C. Circuit did not dispute that if the division of adjudicatory competence set forth in *John Wiley* applied here, Argentina's challenge to the arbitral tribunal's jurisdiction would be a question for the arbitrators. Pet. App. 16a–17a. However, the court of appeals held that *John Wiley* did not establish a general rule, but instead was limited to the context of labor disputes. *Id.* The D.C. Circuit's conclusion is unjustified.

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9. In *John Wiley*, this Court thought it unremarkable that an arbitration agreement that, on its face, required exhaustion of a grievance system might be read to excuse exhaustion when that requirement was unfair or futile. *See* 376 U.S. at 556–58. The arbitral tribunal in this case reached the same conclusion under international law. *See* Pet. App. 165a–171a.

Although other parts of the Court's decision in *John Wiley* relied significantly on policy interests particular to labor disputes, the Court's analysis of the division of authority between courts and arbitrators (Section IV) did not. Instead, the relevant part of the Court's holding was grounded in policies that apply with equal force outside the labor context: the desire to avoid duplication of effort by courts and tribunals, and the need to minimize judicial interference in the arbitral process. *See John Wiley*, 376 U.S. at 558. It is thus unsurprising that this Court has never limited the relevant holding in *John Wiley* to labor disputes; to the contrary, the decision has been central to the Court's resolution of purely commercial disputes as well. *See Howsam*, 537 U.S. at 84–85 (applying *John Wiley* to a broker-dealer dispute).

The D.C. Circuit next distinguished *John Wiley* on the basis that the pre-arbitration procedure in that case involved a period of negotiation, whereas the Treaty here required eighteen months of litigation. Pet. App. 17a. But that factual distinction makes no legal difference. Nothing in *John Wiley*'s determination of the division of responsibility between courts and arbitrators turned on the particular type of dispute resolution required before resorting to arbitration. And the court of appeals pointed to no principled reason why the law would entrust arbitrators to decide whether a negotiation precondition was met, but trust only a court to decide whether the parties had adequately engaged in pre-arbitration litigation. It is illogical to conclude, as the D.C. Circuit did, that by requiring pre-arbitral litigation of the *merits* in *Argentinean courts*, the parties to the Treaty intended that a *United States court*—or the courts of whichever country happened to be the seat of the arbitration—

would have the power to second guess the tribunal's determination of *arbitrability*.[10]

2. The D.C. Circuit was also incorrect to distinguish this Court's decision in *Howsam*. In *Howsam*, this Court confirmed the division of adjudicatory authority stated in *John Wiley* and further endorsed the principle that conditions precedent to arbitration are matters for the arbitrators:

> Indeed, the Revised Uniform Arbitration Act of 2000 (RUAA), seeking to "incorporate the holdings of the vast majority of state courts and the law that has developed under the [FAA]," states that an "arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled." RUAA § 6 (c) and comment 2, 7 U. L. A. 12–13 (Supp. 2002). And the comments add that "in the absence of an agreement to the contrary, issues of substantive arbitrability . . . are for the court to decide and issues of procedural arbitrability, *i.e.*, whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." *Id.*, §6, comment 2, 7 U. L. A. at 13.

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10. The court of appeals' conclusion is particularly surprising given that the power of a court to vacate an award depends on where the arbitration is seated; indeed, the U.S. courts had jurisdiction over the present arbitration only because in this particular case the parties agreed to seat this arbitration in Washington, D.C. *See supra* p. 8.

537 U.S. at 84–85 (alterations in original; emphasis omitted).

The D.C. Circuit brushed off *Howsam* in a footnote. *See* Pet. App. 18a n.6. According to the D.C. Circuit, because *Howsam* dealt with a question of arbitrability arising from a *rule* governing the arbitral procedure—the NASD arbitration rules—this Court's decision has no application to questions of arbitrability arising from an arbitration agreement. *Id.* That distinction draws no support from this Court's decision. Nor did the D.C. Circuit attempt to reconcile its reasoning with the reasoning in *Howsam*, which turned on the type of issue to be resolved (*i.e.*, a "substantive" or "procedural" arbitrability challenge), not on the origin of the requirement that was allegedly not fulfilled. Thus, this Court has applied *Howsam* to questions of arbitrability arising from both arbitration rules and arbitration agreements. *See Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401, 407 n.2 (2003) (holding that, per *Howsam*, application of a provision of an arbitration agreement should be decided by an arbitrator even though that interpretation might determine whether the arbitration agreement was enforceable).

The D.C. Circuit further erred in asserting that *Howsam* could be distinguished on the ground that in that case, the question of arbitrability was intertwined with the facts underlying the substantive dispute, making the tribunal more expert than a court in resolving the jurisdictional challenge. *See* Pet. App. 18a n.6. In fact, this Court in *Howsam* did not contemplate that courts would make a case-by-case determination of whether jurisdictional and merits questions were intertwined. Instead, this Court pointed to the fact that procedural

arbitrability questions—including whether "conditions precedent to an obligation to arbitrate have been met"—frequently will be intertwined with the merits of a dispute as a reason for adopting a *categorical* rule that such questions are for the arbitrator. *See Howsam*, 537 U.S. at 85 (noting that the jurisdictional challenge there at issue "falls within the class of gateway procedural disputes" that must be resolved in arbitration).[11] The D.C. Circuit's contrary suggestion that the allocation of authority between court and arbitrator should be decided on a case-by-case basis, contingent on assessments about the degree of intertwinement in each particular dispute, is a recipe for collateral court proceedings and the evisceration of the efficiencies of arbitration.

In any event, as the arbitral tribunal found, the facts underlying Argentina's jurisdictional challenge *are* intertwined with petitioner's case on the merits: Argentina's denial of access to its court system was relevant both to the tribunal's analysis of the precondition to arbitration (the jurisdictional issue), and to its analysis of the breach of the Treaty (the merits of the case). *See* Pet. App. 165a–171a, 232a–242a, 283a–284a. At the same time, there is no basis for the D.C. Circuit's view

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11. In concluding that the "'gateway' question in this appeal is arbitrability," and therefore one for *de novo* judicial review, Pet. App. 10a, the court of appeals made the very same mistake that this Court corrected in *Howsam*. In *Howsam*, this Court explained that "[l]inguistically speaking, one might call any potentially dispositive gateway question a 'question of arbitrability,'" but the Court's "caselaw, however, makes clear that, for purposes of applying the interpretive rule, the phrase 'question of arbitrability' has a far more limited scope." 537 U.S. at 83.

that it is more qualified to interpret a Treaty between two foreign sovereigns than an arbitral tribunal chosen for its expertise in the international law governing the Treaty, appointed by the parties specifically to interpret the Treaty, and before which these issues were argued at length. The D.C. Circuit's conclusion that the United Kingdom and Argentina "would likely have expected" that a court of the United States would definitively construe the Treaty, Pet. App. 15a, is both illogical and devoid of any support in the Treaty itself.

3. Had the D.C. Circuit followed *John Wiley* and *Howsam*, it would have been compelled to conclude that Argentina's objection was for the arbitrators to decide. Although *John Wiley* and *Howsam*'s presumption in favor of arbitral resolution may be overcome, the D.C. Circuit acknowledged that the "Treaty does not directly answer whether the contracting parties intended a court or the arbitrator to determine questions of arbitrability." *Id.* at 14a. Nor did the court identify any other evidence that the parties had clearly agreed to depart from the ordinary allocation of adjudicative authority.

To be sure, the D.C. Circuit disagreed with the arbitrators' resolution of Argentina's jurisdictional challenge. The court stated that the "Treaty provision at issue is explicit," and the parties' intent clear. *Id.* at 18a. That conclusion was incorrect, *see supra* pp. 9-10, but that is not the point. Judicial distrust of arbitral decision-making is not a ground to resist it, and judicial disagreement (even strenuous disagreement) with an arbitral decision is no ground to overturn it. *See, e.g.*, *AT&T Mobility*, 131 S. Ct. at 1752; *Mitsubishi Motors Corp.*, 473 U.S. at 633–34. This Court should grant certiorari to reaffirm that the

FAA, and this Court's precedent, entrust to arbitrators the resolution of both hard and easy questions, whether a court agrees with the tribunal's decision or not. *See id.*

C. The D.C. Circuit's Decision Contributes To A Conflict Among The Circuits.

The petition should also be granted because the D.C. Circuit's decision contributes to two conflicts among the circuits. The first relates to the division of competence over preconditions to arbitration. The second concerns the role that the arbitral rules chosen by the parties play in the allocation of authority between courts and arbitral tribunals.

1. In departing from *John Wiley* and *Howsam*, the D.C. Circuit contributed to a conflict among the circuits over whether a court or instead an arbitral tribunal decides if a party has complied with a precondition to arbitration in a multi-staged dispute resolution agreement.

a. The majority of circuits that have addressed the question have correctly applied *John Wiley* and *Howsam* to hold that arbitrators have jurisdiction to decide whether such a precondition to arbitration has been satisfied.

The First Circuit, in *Dialysis Access Center, LLC v. RMS Lifeline, Inc.*, 638 F.3d 367 (1st Cir. 2011), was presented with the question of whether arbitration was properly commenced despite a party's alleged failure to comply with the precondition of good-faith negotiation. *Id.* at 383. The party seeking to resist arbitration argued, as did Argentina here, that a right to arbitrate was not triggered until after that precondition had been satisfied. *Id.* The First Circuit held that, under *John Wiley* and *Howsam*,

the effect of a party's failure to satisfy the precondition to arbitration was a question for the arbitrator, not the court. *Id.* Notably, in conflict with the D.C. Circuit, the First Circuit found *John Wiley* applicable even though the case before it was a commercial, not a labor, dispute. Likewise, it applied the Court's teaching in *Howsam* even though the precondition to arbitration appeared in the parties' arbitration agreement (not in the rules governing the arbitration).

The Sixth Circuit similarly requires arbitral tribunals, not courts, to determine the effect of an alleged failure to satisfy a precondition to arbitration in a multi-staged dispute resolution clause. The dispute resolution clause in *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388 (6th Cir. 2008), provided that a party's right to arbitrate would ripen only once the party had first provided written notice of the dispute and had then sought to engage in a period of negotiations. *Id.* at 391. When a dispute occurred, the party resisting arbitration claimed, like Argentina here, that the party invoking arbitration had failed to comply with the two preconditions to arbitration, with the result that it was barred from commencing arbitration. The Sixth Circuit declined to address the challenge. Applying *John Wiley* and *Howsam* (again in the context of a commercial dispute, and again to preconditions to arbitration contained in the parties' agreement), it held that whether the preconditions to arbitration were satisfied was a matter for the arbitrators, and, moreover, that the arbitrators possessed comparatively more expertise than a court to resolve that challenge. *Id.* at 392–93.

Similarly, in *Lumbermens Mutual Casualty Co. v. Broadspire Management Services, Inc.*, 623 F.3d 476 (7th Cir. 2010), the dispute resolution clause made the

parties' agreement to arbitrate subject to the completion of a process of formal claim notification and negotiation. When a dispute arose, Broadspire argued, like Argentina here, that Lumbermens had failed to satisfy the conditions precedent to arbitration, with the result that the arbitration agreement had not come into effect. Applying *John Wiley* and *Howsam* (to this commercial dispute, and to preconditions to arbitration contained in the parties' agreement), the Seventh Circuit held that compliance with the "condition precedent to arbitration . . . is for the arbitrator to address." *Id.* at 481. The court of appeals reasoned that the determination whether the preconditions to arbitration had been, or needed to be, fulfilled would require "engaging in a fact-intensive, specialized inquiry very similar to the inquiry" necessary to resolve the underlying contractual dispute. *Id.* The Seventh Circuit was unwilling to do so, and thus sent the matter to arbitration in accordance with this Court's precedents.

In *International Brotherhood of Electrical Workers, Local Union No. 545 v. Hope Electrical Corp.*, 380 F.3d 1084 (8th Cir. 2004), Hope Electrical opposed the Union's motion to compel arbitration because, in Hope Electrical's view, "the parties had not deadlocked in their negotiations," which was a precondition to arbitration. *Id.* at 1096–99. The Eighth Circuit, however, refused to address that jurisdictional challenge, and instead referred it to arbitration in accordance with *John Wiley* and *Howsam*. *See id.*

Had the First, Sixth, Seventh, and Eighth Circuits heard the present dispute, those courts would have deferred to the arbitral tribunal's resolution of Argentina's

jurisdictional challenge. Each of those courts holds that compliance with a precondition to arbitration is for the arbitrators to resolve, even if the argument is, as is frequently the case, that the failure to satisfy a precondition to arbitration negates a party's consent to arbitrate. The D.C. Circuit's decision thus presents a square conflict with the decisions of the First, Sixth, Seventh, and Eighth Circuits.

b. On the other hand, the D.C. Circuit is joined by the Eleventh Circuit in deciding *de novo* whether preconditions to arbitration have been satisfied. While not addressing *John Wiley* or *Howsam* directly, the Eleventh Circuit in *Kemiron Atlantic, Inc. v. Aguakem International, Inc.*, 290 F.3d 1287 (11th Cir. 2002) (per curiam), concluded that it is for a court to determine whether a party complied with a precondition to arbitration in a tiered dispute resolution provision. In *Kemiron Atlantic*, the Eleventh Circuit held that a party's failure to comply with a precondition to arbitration—a period of mediation—prevented it from commencing arbitration. *Id.* at 1291. Unlike the First, Sixth, Seventh, and Eighth Circuits, the Eleventh Circuit did not refer that jurisdictional challenge to the arbitrators, but resolved the challenge itself.

2. The petition should be granted for the additional reason that the D.C. Circuit's decision creates a direct conflict with the holding of the Second Circuit on the effect of arbitral rules on the allocation of competence between courts and arbitral tribunals.

Even when an issue is presumptively for the courts (for example, whether a particular dispute falls within the scope of an arbitration agreement), that presumption

may be overcome by "clear and unmistakable" evidence of a contrary intent. *First Options*, 514 U.S. at 944 (alterations omitted). The Second Circuit holds that such a "clear and unmistakable" intent exists when the parties' arbitration clause incorporates arbitral rules, such as the UNCITRAL Rules, that explicitly vest tribunals with the power to rule on challenges to their own jurisdiction. *See Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 393–94 (2d Cir. 2011).

In *Republic of Ecuador*, the Republic of Ecuador (Ecuador) argued that Chevron Corp. had waived its right to commence arbitration, or was otherwise estopped from doing so, under the bilateral investment treaty between the United States and Ecuador. *See id.* at 391–92. The Second Circuit held, consistent with *John Wiley* and *Howsam*, that both of those challenges were questions for the arbitral tribunal. *Id.* at 393–94.

Ecuador, however, had characterized its challenges as undermining the arbitration agreement itself, which, according to Ecuador, meant that its challenges fell into the narrow category of jurisdictional objections presumptively to be resolved by the courts. *Id.* at 394. The Second Circuit assumed *arguendo* that Ecuador's characterization was correct. The court nevertheless held that by signing the investment treaty with the United States, Ecuador had agreed to resolve disputes with U.S. investors under the UNCITRAL Rules. The court explained that Article 21 of those Rules states that the arbitral tribunal "shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the . . . arbitration agreement." *Id.* The Second Circuit held that by incorporating the UNCITRAL Rules

into the Treaty, Ecuador had "consented to sending challenges to the 'validity' of the arbitration agreement to the arbitral panel." *Id.* Thus, Ecuador's jurisdictional challenges were to be resolved in arbitration, however those challenges were characterized.

In this case, Argentina similarly agreed to be bound by the UNCITRAL Rules in arbitrations commenced by U.K. investors. Pet. App. 13a–14a. The Second Circuit would deem that fact determinative: the court would have declared Argentina's jurisdictional objection to be a matter for the arbitrators, whether it was characterized as a failure to satisfy a precondition to arbitration (*Howsam*), or a challenge to the existence of the arbitration agreement itself (*First Options*). *See Republic of Ecuador*, 638 F.3d at 393–94.

The D.C. Circuit reached the opposite outcome. While it began by recognizing that the parties' adoption of the UNCITRAL Rules granted the arbitrators competence to determine challenges to their own jurisdiction, it then found that the application of the UNCITRAL Rules was subject to a "temporal limitation," such that "the Rules are not triggered until after an investor has first . . . sought recourse, for eighteen months, in a court [of the state in which] the investment was made." Pet. App. 14a. According to the D.C. Circuit, Article 21 of the UNCITRAL Rules gives the arbitrators the power to rule on all challenges to arbitrability, but not if there is a dispute as to the effect of a precondition to arbitrability. Put another way, the D.C. Circuit held that Article 21 gives arbitral tribunals the power to rule on their own jurisdiction, but only after a court determines that arbitral jurisdiction is properly invoked. The court's "temporal limitation" is, of course,

circular and deprives Article 21 of the UNCITRAL Rules of any real meaning. It also conflicts squarely with the holding of the Second Circuit, which does not subject the incorporation of the UNCITRAL Rules to such a temporal limitation. *See Republic of Ecuador*, 638 F.3d at 394 (holding without limitation that by incorporating Article 21 of the UNCITRAL Rules into its arbitral clause, Ecuador had "consented to sending challenges to the 'validity' of the arbitration agreement to the arbitral panel").

D. The Question Presented Is Important.

If left to stand, the D.C. Circuit's decision provides a basis to solicit the intervention of the courts, by means of a motion to stay arbitration or vacate an arbitral award, every time a party alleges that a precondition to arbitration has not been fulfilled. Accordingly, the decision will open the gates to a flood of litigation seeking to delay, derail, or frustrate arbitration, thereby undermining the national policy in favor of arbitration and nullifying one of its central benefits—the expeditious resolution of disputes. *See Mitsubishi Motors Corp.*, 473 U.S. at 633 (stating that a prime objective of an agreement to arbitrate is to achieve "streamlined proceedings and expeditious results"); *Moses H. Cone*, 460 U.S. at 22 (noting Congress's intent "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible").

The implications of the D.C. Circuit's decision are especially concerning given the increasing frequency with which parties incorporate staged arbitration clauses into their agreements. *See supra* pp. 17-19. The D.C. Circuit's

decision gives parties the ability to initiate litigation or move to stay arbitration any time it is alleged that a precondition to arbitration has not been satisfied. In addition, the decision invites every single party that loses an arbitration to move to vacate on the ground that a negotiation period or some other precondition to arbitration had not been complied with—even though in each case a tribunal would already have concluded that there was no such failure or that the failure was excused. If, as the D.C. Circuit held, this Court's decision in *John Wiley* is limited to labor disputes, and *Howsam* is limited to preconditions to arbitration that appear in arbitral rules, then the vast majority of challenges will fall between those two poles and end up in court. That result not only conflicts with Congress's strong policy in favor of arbitral dispute resolution, *see supra* pp. 16-17, but it will also lead to a massive increase in pre- and post-award litigation, placing even greater strain on the court system. In short, the D.C. Circuit's decision gives license to any party seeking to delay arbitration, or to increase its cost, to initiate collateral court proceedings.

The geographical coverage of the D.C. Circuit makes the resolution of this issue of critical importance. The District of Columbia is a frequent seat for arbitration in the United States. Indeed, it is a recurring seat for international arbitrations under bilateral and multilateral investment treaties, including a large proportion of disputes against the United States under the NAFTA.[12]

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12. This case is of particular importance to the United States given the frequency with which NAFTA arbitrations against the United States are seated in Washington, D.C. Of the seventeen arbitrations filed against the United States under the NAFTA (as listed on the website of the U.S. Department of State), a legal seat

Permitting the D.C. Circuit to continue to treat arbitration with hostility will therefore have a materially detrimental effect on one of the key centers of arbitration within the United States.[13] Prominent arbitration practitioners have already warned against the harmful effect of the D.C. Circuit's decision, and have noted the possibility that the decision, and the circuit split it has created, will encourage forum shopping. *See* Carolyn B. Lamm & Eckhard R. Hellbeck, *US Court of Appeals Vacates BG Group's Investment Treaty Award Against Argentina for Failure To Litigate in Argentine Courts for 18 Months Before Commencing Arbitration*, 15 Int'l Arb. L. Rev. N-14, N-18 (2012) (noting that the decision "may significantly affect Washington, D.C.'s standing as a seat of international arbitration").[14]

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of arbitration has been set in twelve cases; in ten of those twelve cases, the legal seat is Washington, D.C. *See NAFTA Investor-State Arb.: Cases Filed Against the U.S.*, U.S. Dep't of State, http://www.state.gov/s/l/c3741.htm (last visited July 26, 2012).

13. In addition, the default venue provision for actions against a foreign state—including an action to recognize an arbitration award pursuant to the New York Convention—is the U.S. District Court for the District of Columbia, unless limited exceptions apply. *See* 28 U.S.C. § 1391(f).

14. Moreover, because bilateral investment treaties play a significant role in international commerce through the promotion and protection of foreign investment, it is critically important that courts respect the allocation of jurisdictional competence set out therein.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 27, 2012

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JANUARY 17, 2012

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-7021

REPUBLIC OF ARGENTINA,

APPELLANT

v.

BG GROUP PLC,

APPELLEE

Appeal from the United States District Court
for the District of Columbia

(No. 1:08-cv-00485)

Argued November 10, 2011
Decided January 17, 2012

Before: SENTELLE, *Chief Judge*, HENDERSON and ROGERS, *Circuit Judges*.

Opinion for the Court by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: The Republic of Argentina appeals the denial of its motion to vacate an arbitral award on the principal ground that the arbitral panel exceeded its

authority by ignoring the terms of the parties' agreement. That agreement, in the form of a Bilateral Investment Treaty between the United Kingdom of Great Britain and Northern Ireland, and Argentina ("the Treaty"), provides that disputes between an investor and the host State will be resolved in the host State's courts. If, however, no final court ruling is forthcoming within eighteen months or the dispute is unresolved after a court ruling, the Treaty provides that resort may then be had to arbitration. BG Group, PLC, a British corporation and investor in Argentina gas companies pursuant to the Treaty, invoked the arbitration clause without first filing a claim in the Argentine courts. The arbitral panel nonetheless ruled it had jurisdiction, found Argentina had violated the Treaty, and awarded BG Group damages.

Although the scope of judicial review of the substance of arbitral awards is exceedingly narrow, it is well settled that an arbitrator cannot ignore the intent of the contracting parties. Where, as here, the result of the arbitral award was to ignore the terms of the Treaty and shift the risk that the Argentine courts might not resolve BG Group's claim within eighteen months pursuant to Article 8(2) of the Treaty, the arbitral panel rendered a decision wholly based on outside legal sources and without regard to the contracting parties' agreement establishing a precondition to arbitration. Accordingly, we reverse the orders denying the motion to vacate and granting the cross-motion to confirm, and we vacate the Final Award.

Appendix A

I.

The Bilateral Investment Treaty between the United Kingdom and Argentina was signed December 11, 1990, and became effective on February 19, 1993. It aimed to promote a favorable investment environment between the contracting parties following Argentina's economic reformation to reduce inflation and the public debt. As relevant, Article 8(1) of the Treaty provides that disputes between an investor under the Treaty and the host State that "have not been amicably settled shall be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made." Article 8(2) sets the conditions by which such a dispute may be submitted to international arbitration:

> (a) if one of the Parties so requests, in any of the following circumstances:
>
> > (i) where, *after a period of eighteen months has elapsed* from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;
> >
> > (ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute; [or]

> (b) where the Contracting Party and the investor of the other Contracting Party have so agreed.

Art. 8(2) (emphasis added). Article 8(3) provides that if, after three months from written notification of the claim, the parties to the dispute are unable to agree on one of the described arbitration procedures, then "the Parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law ["UNCITRAL Rules"]," although they can modify these rules.

Article 8(4) instructs that "[t]he arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement [i.e., the Treaty], the laws of the Contracting Party involved in the dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law."

Around the time the Treaty took effect, as part of its economic reformation, Argentina privatized the state-owned gas transportation and distribution company, *Gas del Estado*, and established a 1:1 fixed parity between the Argentine peso and the U.S. dollar. *Gas del Estado* was split into two transportation companies and eight distribution companies, one of which was MetroGAS. MetroGAS was granted a thirty-five year exclusive license to distribute gas in the city of Buenos Aires and portions of the surrounding metropolitan area, and the license provided that tariffs would be calculated in U.S. dollars

and expressed in pesos. One provision of MetroGAS's license provided that adjustments to tariffs would be made every six months for inflation, in accordance with the United States Product Price Index ("PPI"). MetroGAS was entitled to review of its tariffs every five years to ensure reasonable returns. BG Group eventually acquired a 54.67 percent interest in Gas Argentino, S.A. ("GASA"), which in turn owned seventy percent of MetroGAS. In addition, BG Group invested directly in MetroGAS, and by 1998 held a 45.11 percent interest in MetroGAS.

The Argentine economy collapsed in late 2001 and early 2002 following, Argentina explained, the collapse of the Brazilian currency, a run on Argentine banks, and the withholding of a billion dollar loan installment by the International Monetary Fund. In response, Argentina enacted Emergency Law 25,561 on January 6, 2002, to terminate the currency board that had pegged the peso to the U.S. dollar, to convert U.S. dollar based adjustment clauses in agreements to peso-based adjustment clauses, to prohibit inflation adjustments based on foreign price indices (e.g., the PPI), and to convert dollar-based tariffs into peso-based tariffs at a rate of one peso to one U.S. dollar. Argentina also established, by Resolution 308/02 and Decree 1090/02, a renegotiation process for public service contracts (excluding any licensee who sought redress in court or arbitration). And on March 2, 2002, Argentina adopted Decree 214/02, Article 12 of which stayed for 180 days the compliance with injunctions and execution of final judgments in lawsuits brought on account of the Emergency Law's effect on the financial system.

Appendix A

Eight months after the stay under Article 12 of Decree 214/02 had expired, BG Group filed a Notice of Arbitration, on April 25, 2003, pursuant to Article 8(3) of the Treaty. When it was unable to reach agreement with Argentina on an alternate forum, BG Group submitted to arbitration under the UNCITRAL Rules. As characterized by the Arbitral Panel, a ministerial opinion (appearing in an article by the former Argentina Attorney General and Minister of Justice) submitted by BG Group estimated that it would take six years to resolve BG Group's claim in the Argentine courts, and BG Group therefore viewed the requirement in Article 8(2) of the Treaty as "senseless," Final Award ¶ 142, and saw no reason to wait eighteen months before requesting arbitration. Alternatively, BG Group argued that customary international law did not require exhaustion of local remedies, and that Article 3 of the Treaty, the Most Favored Nation Clause, obviated the requirement that it seek recourse in Argentine courts given that Argentina's investment treaty with the United States lacked such a requirement.

The Arbitral Panel issued a Final Award on December 24, 2007, in Washington, D.C. The Panel determined it had jurisdiction. It rejected BG Group's arguments that the dispute was arbitrable because an Argentine court would not resolve the dispute within eighteen months and that international law did not require exhaustion of local remedies. Instead, the Panel concluded that although BG Group did not seek recourse in Argentine courts for the eighteen month period required by Article 8(2) of the Treaty, that provision could not, "[a]s a matter of Treaty interpretation . . . be construed as an absolute impediment to arbitration." Final Award ¶ 147. Citing Article 32 of

the Vienna Convention,[1] the Panel concluded that because Argentina by emergency decrees had restricted access to its courts and had excluded from the renegotiation process any licensee that sought redress, a literal reading of the Treaty would produce an "absurd and unreasonable result." *Id.* The Panel thus found it unnecessary to decide whether Article 3 of the Treaty made Article 8(1) and (2) inoperative.

On the merits, the Arbitral Panel ruled BG Group had standing to bring its claim because, under the terms of the Treaty, it was an "investor" with an "investment"[2] (in GASA

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1. Article 32 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 ("Vienna Convention"), provides that in interpreting a treaty:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable."

Article 31 sets forth the "General rule of interpretation," stating in paragraph 1 that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

2. Article 1(a)(ii) of the Treaty defines an "investment" to include "shares in and stock and debentures of a company and

and MetroGAS), which suffered a decrease in the value as a result of the Emergency Law. It rejected BG Group's claim that Argentina had breached Article 5 of the Treaty or expropriated its investment in MetroGAS, because the decrease in the value of BG Group's investment was not permanent. It found, however, that Argentina had violated Article 2 of the Treaty by failing to provide fair and equitable treatment to investments,[3] in that its actions in the early 1990s led to BG Group's investment and by dismantling the regulatory scheme that induced the investment, "Argentina violated the principles of stability and predictability inherent to the standard of fair and equitable treatment." *Id.* ¶ 307. The violation was exacerbated, it found, by the exclusion of licensees seeking relief in an arbitral or other forum from the renegotiation process. The Panel rejected Argentina's state-of-necessity defense under customary international law, on the ground the defense was limited to exceptional circumstances, such as where there is a "serious and imminent threat and no means to avoid it." *Id.* ¶ 410 (internal quotation marks and citation omitted). Finally, the Panel awarded damages based on a comparison of two trades of BG Group's shares

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any other form of participation in a company, established in the territory of either of the Contracting Parties."

3. Article 2(2) of the Treaty provides that "[i]nvestments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment .... Neither Contracting Party shall in any way impair by unreasonable ... measures the management, maintenance, use, enjoyment or disposal of investments in its territory.... Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party."

— one in 1998 (three and a half years before enactment of the Emergency Law) and one in 2002 (shortly after enactment of the Emergency Law) — extrapolating the value of BG Group's total investment and assessing the difference as the damages caused by the Emergency Law: $185,285,485.85 in U.S. dollars (excluding interest, costs, and attorneys' fees).

Argentina petitioned to vacate or modify the Final Award pursuant to the FAA, 9 U.S.C. §§ 10(a) & 11.[4] BG Group filed an opposition and a cross-motion for recognition and enforcement of the Final Award, and for a prejudgment bond. Following further filings in opposition or reply, the district court denied vacatur and granted enforcement. *Republic of Argentina v. BG Group PLC*, 715 F. Supp. 2d 108 (D.D.C. 2010); *Republic of Argentina v. BG Group PLC*, 764 F. Supp. 2d 21 (D.D.C. 2011). Argentina

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4. Section 10(a) of the FAA, 9 U.S.C. § 10(a), provides that an arbitration award may be vacated

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

appeals; our review of the district court's findings of fact is for clear error and our review of questions of law is *de novo*. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947–48 (1995); *Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 481 F.3d 813, 816 (D.C. Cir. 2007).

II.

The "gateway" question in this appeal is arbitrability: when the United Kingdom and Argentina executed the Treaty, did they, as contracting parties, intend that an investor under the Treaty could seek arbitration without first fulfilling Article 8(1)'s requirement that recourse initially be sought in a court of the contracting party where the investment was made? That question raises the antecedent question of whether the contracting parties intended the answer to be provided by a court or an arbitrator.

The Supreme Court has held that the intent of the contracting parties controls whether the answer to the question of arbitrability is to be provided by a court or an arbitrator. *See, e.g.*, *First Options*, 514 U.S. at 943. "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* at 944 (quoting *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986) (alterations in original). This comports with the "basic objective" of arbitration, which the Court explained "is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other

contracts, are enforced according to their terms." *Id.* at 947 (internal quotation marks and citations omitted). Thus, in "construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.'" *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758, 1773–74 (2010) (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

In *Howsam v. Dean Witter*, 537 U.S. 79 (2002), the Court provided guidance on the circumstances in which a court, rather than the arbitrator, is to decide a "question of arbitrability," *id.* at 83. A court will decide the question

> in the kind of narrow circumstances where the contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.

Id. at 83–84. In such circumstances, where "the parties did *not* agree to submit the arbitrability question itself to arbitration, then the district court should decide that question . . . independently." *First Options*, 514 U.S. at 943 (emphasis in original). If, on the other hand, there is clear and unmistakable evidence that the parties intended for the arbitrator to decide the question of arbitrability, a district court's review of the arbitrator's decision on that

matter "should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. . . . That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances." *Id.* (internal citations omitted).

The district court viewed Argentina as having conceded that the Treaty provided that the arbitrator would decide the question of arbitrability. It cited counsel's statement at the motions hearing that Argentina "'acknowledge[s] that the Arbitral Tribunal has the principal power to rule upon its jurisdiction.'" *Republic of Argentina*, 764 F. Supp. 2d at 33 & n.8 (quoting Tr., Sept. 28, 2010, at 4) (alteration in original). The context in which counsel made this statement, and the subsequent colloquy with the district court, however, indicate that Argentina was conceding an altogether different point: once the Treaty's arbitration provision was properly triggered, after eighteen months' recourse to an Argentine court, any question of arbitrability *then* would be decided by the arbitrator. *See* Tr., Sept. 28, 2010, at 5. Indeed, in the sentence immediately following the one cited by the district court, Argentina's counsel stated: "However, we also understand that this Court has the right to and the duty to under the New York Convention to assess whether . . . Argentina's consent to arbitration [was] respected." *Id.* at 4. The transcript indicates this statement qualifies the previous sentence about arbitrability, rather than presents a new argument, because counsel next stated that the consent was "also" relevant to "whether the award is contrary or not to U.S. [public] policy," *id.*, a separate argument under

the New York Convention.

Any concession by Argentina was thus limited to stating that the parties agreed the issue of arbitrability would be decided by an arbitrator if the aggrieved party had first sought relief in an Argentine court, pursuant to Article 8(1) and (2) of the Treaty. Indeed, its counsel made the point explicit in responding to the district court's next inquiry about whether the Treaty provided that the UNCITRAL Rules would apply if there were no agreement on an arbitral forum. *See id.* at 4–5. Argentina's counsel stated: "The fundamental issue[] here and that's our first objection is that [under the terms of the Treaty] Argentina's consent to arbitration had a very important condition. And that condition was that the dispute had to be submitted for 18 months to local courts to an Argentine judge." *Id.* at 5. The transcript thus demonstrates, when the statement by Argentina's counsel on which the district court relied is viewed in context, that the district court clearly erred in finding that Argentina had conceded that the arbitrator had the power to determine arbitrability under the circumstances.

A temporal analysis of the Treaty confirms this conclusion. Article 8(3) of the Treaty provides for the procedure to be followed once the possibility of arbitration is triggered, but only after an Argentine court first has an opportunity to resolve the dispute. Under Article 8(3), if the parties do not agree on an arbitration forum or procedure, the UNCITRAL Rules will govern resolution of the dispute; the UNCITRAL Rules grant the arbitrator

the power to determine issues of arbitrability.[5] Thus, once Article 8(3) of the Treaty is triggered, the Treaty's incorporation of the UNCITRAL Rules provides "clear[] and unmistakabl[e] evidence," *AT & T Techs.*, 475 U.S. at 649; *see First Options*, 514 U.S. at 944, that the parties intended for the arbitrator to decide questions of arbitrability. *See Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 394 (2d Cir. 2011). But the Treaty's incorporation of the UNCITRAL Rules has a temporal limitation: the Rules are not triggered until after an investor has first, pursuant to Article 8(1) and (2), sought recourse, for eighteen months, in a court of the contracting party where the investment was made.

The Treaty does not directly answer whether the contracting parties intended a court or the arbitrator to determine questions of arbitrability where the precondition of resort to a contracting party's court pursuant to Article 8(1) and (2) is disregarded by an investor. By comparison, the Treaty states in Article 9(2) that should a dispute arise between the contracting parties themselves, the United Kingdom and Argentina, and it is not resolved through diplomatic channels, the dispute will go directly to arbitration. Article 9(5) provides that "[t]he [arbitral] tribunal shall determine its own procedure." This provision indicates that the contracting parties were aware of how to provide an arbitrator with the authority

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5. Article 21(1) of the UNCITRAL Arbitration Rules, G.A. Res. 31/98, art. 21, para. 1, U.N. Doc. A/RES/31/98 (Dec. 15, 1976), provides that "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction" to hear the arbitration.

to determine a "question of arbitrability," *cf. BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994), and suggests that the absence of such language in Article 8(1) and (2) was intentional, *cf. First Options*, 514 U.S. at 945. It also underscores the importance the contracting parties ascribed to Article 8(1) and (2), counseling against a reading that would render its requirements inoperative.

Furthermore, the contracting parties likely never conceived of the need to specify that a *court* should decide whether Article 8(1) and (2)'s requirement that disputes first be brought to a *court* should be respected. The Treaty provides a prime example of a situation where the "parties would likely have expected a court" to decide arbitrability. *Howsam*, 537 U.S. at 83. It would be odd to assume that where the gateway provision *itself* is resort to a court, the parties would have been surprised to have a court, and not an arbitrator, decide whether the gateway provision should be followed. At the very least, there is no clear and unmistakable evidence, *see First Options*, 514 U.S. at 944, that the contracting parties intended an arbitrator to decide the gateway question.

Because the Treaty provides that a precondition to arbitration of an investor's claim is an initial resort to a contracting party's court, and the Treaty is silent on who decides arbitrability when that precondition is disregarded, we hold that the question of arbitrability is an independent question of law for the court to decide. *See id.* The district court therefore erred as a matter of law by failing to determine whether there was clear

and unmistakable evidence that the contracting parties intended the arbitrator to decide arbitrability where BG Group disregarded the requirements of Article 8(1) and (2) of the Treaty to initially seek resolution of its dispute with Argentina in an Argentine court.

The Supreme Court's decision in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), does not require the opposite conclusion. In *John Wiley*, the Court drew a distinction between "substantive" questions of arbitrability and "procedural" questions of arbitrability, assigning the former to courts and the latter to arbitrators. *Id.* at 557. It did so in the context of an industrial labor dispute under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. The premise underlying section 301 is a congressional policy favoring speedy arbitral resolution of labor disputes as an ongoing part of the collective bargaining process, to avoid the industrial strife that had historically led to labor strikes. *See United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). "[A]rbitration of labor disputes . . . is part and parcel of the collective bargaining process itself," *id.*, and thus "[t]he processing of disputes through [arbitration] is actually a vehicle by which meaning and content are given to the collective bargaining agreement," *id.* at 581. In the context of labor disputes, "judicial inquiry under [§] 301 must be strictly confined . . . . Doubts should be resolved in favor of [arbitration]." *Id.* at 582–83. Given this context, the *John Wiley* Court was concerned with "the delay attendant upon judicial proceedings preliminary to arbitration. . . . [S]uch delay may entirely eliminate the prospect of a speedy arbitrated settlement of the dispute,

. . . contrary to the aims of national labor policy." *John Wiley*, 376 U.S. at 558.

The dispute between Argentina and BG Group arises in an entirely different context: an international investment treaty between two sovereigns. The provision at issue in the United Kingdom–Argentina Treaty, Article 8(1) and (2), illustrates why the reasoning in *John Wiley* is inapposite. The Treaty explicitly *requires* judicial proceedings prior to arbitration. That is, the contracting parties specifically desired "the delay attendant upon judicial proceedings preliminary to arbitation," *John Wiley*, 376 U.S. at 558, and the procedural/substantive arbitrability distinction drawn to accord with "the policy behind federal labor law," *id.* at 559, cannot be applied to a dispute over the operation of an international treaty provision that *requires* that which the Court in *John Wiley* sought to avoid. Furthermore, in *John Wiley*, the Court found it significant that the Union, not the arbitrator, questioned the operative relevance of the preconditions to arbitration in the collective bargaining agreement, because as a result the facts underlying the question of arbitrability "gr[e]w out of the dispute and b[ore] on its final disposition. *Id.* at 557. By contrast, as characterized by the Arbitral Panel, BG Group did not question its ability to commence a lawsuit in an Argentine court based on any of the decrees discussed by the Panel, but instead argued that a decision would not be rendered within eighteen months and thus it was "senseless" to adhere to the Treaty provision, Final Award ¶ 142. Unlike in *John Wiley*, here the facts underlying the question of arbitrability did not "grow out of the dispute" between BG

Group and Argentina, but instead were raised *sua sponte* by the Panel. The question of arbitrabilty here precedes rather than grows out of the dispute.[6]

Because the Treaty provision at issue is explicit, the usual "emphatic federal policy in favor of arbitral dispute resolution," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), cannot function to override the intent of the contracting parties. It may be that parties generally negotiate arbitration clauses to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.* at 628. A court interpreting such a clause in the international trade context is informed by "a strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes and an equal commitment to the enforcement of freely negotiated choice-of-forum clauses." *Id.* at 631. In a case such as *Mitsubishi Motors*, this results in enforcing an agreement to arbitrate, which historically required "national courts . . . to shake off the old judicial hostility to arbitration."

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6. *Howsam*, 537 U.S. at 82, 85, is also distinguishable because the question of arbitrability arose from a rule, promulgated by the National Association of Securities Dealers ("NASD"), that functioned as a six year statute of limitations. *Id.* at 82. The question of arbitrability thus was intertwined with the facts underlying the substantive dispute. The Supreme Court reasoned that the NASD arbitrators were "comparatively more expert about the meaning of their own rule, . . . [and thus] better able to interpret and to apply it." *Id.* at 85. Here, the question of arbitrability is separate from the underlying dispute, and the Treaty requirement to seek relief first in court was required by the contracting parties, not promulgated by the Arbitral Panel.

Id. at 638 (internal quotation marks and citation omitted). But where, as here, the contracting parties provided that an Argentine court would have eighteen months to resolve a dispute prior to resort to arbitration, a court cannot lose sight of the principle that led to a policy in favor of arbitral resolution of international trade disputes: enforcing the intent of the parties. "'[A]greeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.'" *Id.* at 630 (quoting *M/S Bremen v. Zapata Off- Shore Co.*, 407 U.S. 1, 13–14 (1972)). Therefore, "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes requires that we enforce the parties' agreement." *Id.* at 629. Where the contracting parties agree to require dispute resolution in a court prior to arbitration, and the aggrieved party initiating the dispute disregards the requirement, a fundamentally different question of arbitrability arises than that of the ignored informal resolution steps in *John Wiley*. In keeping with the foundational principles expressed above, *see, e.g., Stolt-Nielsen*, 130 S. Ct. at 1774–75; *Howsam*, 537 U.S. at 83, a *John Wiley* assumption that the arbitrator is to determine the question of arbitrability cannot sensibly apply here.

Accordingly, "[b]ecause we conclude that there can be only one possible outcome on the [arbitrability question] before us," *Stolt-Nielsen*, 130 S. Ct. at 1770, namely, that BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing

for arbitration pursuant to Article 8(3) if the dispute remained, we reverse the orders denying the motion to vacate and granting the cross-motion to confirm the Final Award, and we vacate the Final Award.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED JANUARY 21, 2011

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 08-485 (RBW)

REPUBLIC OF ARGENTINA,

Plaintiff,

v.

BG GROUP PLC,

Defendant.

MEMORANDUM OPINION

Currently before the Court is a cross-motion filed by respondent BG Group PLC ("BG Group") to confirm an arbitral award (the "Award") rendered in its favor and against petitioner Republic of Argentina ("Argentina") under the Federal Arbitration Act, 9 U.S.C. § 207 (2000) (the "FAA"), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *available at* 1970 WL 104417 (the "New York Convention" or the "Convention"), which was ratified by Congress and codified at 9 U.S.C. §§ 201-08 (2000). Cross-Motion for Recognition and Enforcement of Arbitral Award (the "Resp't's Cross-

Mot.") at 1. Argentina previously moved to vacate the Award under the FAA and the New York Convention, but the Court denied that relief in a memorandum opinion and order issued on June 7, 2010. *Republic of Argentina v. BG Group*, 715 F. Supp. 2d 108, 126 (D.D.C. 2010) (Walton, J.). The Court held a hearing on September 28, 2010, as to the merits of the motion currently before the Court, at which time the Court issued an oral ruling granting the cross-motion and informed the parties that it would memorialize its rationale and ruling thereafter. Hearing Transcript ("Tr.") 48:17-21, Sept. 28, 2010. This memorandum opinion represents the Court's adherence to that promise.

I. Background

Many of the facts germane to the issues confronting the Court in this case have already been set forth in the June 7, 2010 memorandum opinion, but in the interest of providing the factual background necessary to understanding the Court's legal analysis below, those facts will be revisited here.[1] On December 11, 1990, Argentina

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1. The Court considered the following documents in reaching its decision: (1) Argentina's Petition to Vacate or Modify Arbitration Award (the "Pet'r's Pet."); (2) the Memorandum of Points and Authorities of BG Group PLC in Opposition to Motion to Vacate and in Support of Cross Motion for Recognition and Enforcement and for a Pre- Judgment Bond (the "Resp't's Cross-Mot."); (3) Argentina's Memorandum of Points and Authorities in Reply to Respondent's Opposition to the Motion to Vacate or Modify Arbitration Award and in Opposition to Respondent's Cross-Motions for Confirmation of the Award and For a Pre-Judgment Bond (the "Pet'r's Reply"); (4) BG Group's Memorandum of Points and Authorities in Reply to Petitioner's Opposition to

and the United Kingdom entered into the Agreement for the Promotion and Protection of Investments, Arg.-U.K., Dec. 11, 1990, 1765 U.N.T.S. 33 ("Investment Treaty"), the purpose of which was to promote foreign investment between these two nations. Resp't's Cross-Mot. at 1; Pet'r's Pet. ¶ 13. Similar to other bilateral investment treaties entered into around the same period, the Investment Treaty was designed to ensure foreign investors that they would be treated fairly and equitably, to provide them with "full protection and security," and to restrict the host country "from expropriating the assets of such investors without just compensation." Respt't's Cross-Mot. at 1. To address any disputes arising from these investments, Argentina and the United Kingdom agreed to a two-tiered

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Respondent's Cross-Motion for Recognition and Enforcement and for a Pre-Judgment Bond (the "Resp't's Reply"); (5) BG Group's Supplemental Memorandum of Law in Support of Respondent's Motion for Pre-Judgment Bond (the "Resp't's Supp. Mem."); (6) Argentina's Supplemental Memorandum of Points with Regard to Posting a Bond (the "Pet'r's Supp. Mem."); (7) Argentina's Second Supplemental Memorandum of Points with Regard to Posting of Bond (the "Pet'r's 2d Supp. Mem."); (8) BG Group's Supplemental Memorandum of Law on the Applicability of the New York Convention (the "Resp't's 2d Supp. Mem."); (9) Argentina's Supplemental Memorandum Refusing Respondent's Request for a Pre-Judgment Bond (the "Pet'r's 3d Supp. Mem."); (10) BG Group's Supplemental Memorandum in Support of Respondent's Motion for a Pre-Judgment Bond (the "Resp't's 3d Supp. Mem."); (11) Argentina's June 30, 2010 Supplemental Memorandum (the "Pet'r's 4th Supp. Mem."); (12) BG Group's Reply Supplemental Memorandum of Points and Authorities of Petitioner (the "Resp't's 4th Supp. Mem."); and (13) the Reply Supplemental Memorandum of Points and Authorities of Petitioner.

system of dispute resolution in which the dispute could be submitted to a "competent tribunal" of the country "in whose territory the investment was made," after which the matter could be referred to arbitration under certain conditions, or the dispute could be submitted directly to international arbitration.[2] Investment Treaty, art. 8(2).

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2. Article 8(2) of the Investment Treaty provides for recourse to arbitration under the following circumstances:

> (a) if one of the Parties so requests . . .:
>
> > (i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to [a] competent tribunal of the [country] in whose territory the investment was made;
> >
> > (ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;
>
> (b) where the [Parties] have so agreed.

Furthermore, the Investment Treaty provides that "where the dispute is referred to international arbitration," the parties "may agree to refer the dispute either to: (a) the International Centre for the Settlement of Investment Disputes [(the "ICSID")] . . . or (b) an international arbitrator or *ad hoc* arbitration tribunal . . . under the Arbitration Rules of the United Nations Commission on International Trade Law [(the "UNCITRAL Rules")]. Award at 6 (citing Article 8(3)(a)-(b) of the Treaty). Here, "[b]ecause the [p]arties failed to agree on submission of the dispute to [the ICSID], [BG Group] submitted the arbitration under [the UNCITRAL Rules]." *Id.* at 7.

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Also as part of its economic reforms, Argentina enacted several measures in an effort "to reduce inflation and the public deficit," including "privatization of certain state[-]owned companies in many sectors[,] including the gas transportation and distribution industry." Pet'r's Pet. ¶ 15. As part of these efforts, Argentina divided its gas transportation and distribution industry, Gas del Estado, Sociedad del Estado, into two transportation companies and eight distribution companies. *Id.* ¶ 18. BG Group, a United Kingdom company, invested in one of the eight gas distribution companies, MetroGAS, through a consortium of investors known as Gas Argentino, S.A. *Id.* ¶ 20. Eventually, BG Group acquired a 54.67% interest in Gas Argentino, S.A., which in turn owned 70% of MetroGAS. *Id.* ¶¶ 20-21.

In 2001, after a period of exceptional economic growth, Argentina began to suffer an economic crisis. Pet'r's Pet. at 6-7. In its efforts to respond to this predicament, Argentina enacted an emergency law that took effect on January 6, 2002, which consisted of several measures that, according to BG Group, negatively impacted its investment in MetroGAS. *Id.*; Respt't's Cross-Mot. at 2. As a result, BG Group initiated international arbitration proceedings on April 25, 2003, under Article 8 of the Investment Treaty,[3] Respt't's Cross-Mot. at 2; Pet'r's Pet. ¶ 6, arguing that Argentina's promulgation of these emergency measures violated Article 5 of the Investment Treaty "by expropriating BG[Group's] . . . shareholding

3. Over 25 foreign investors initiated arbitration against Argentina claiming violation of bilateral investment treaties as a result of the emergency law's impact. Respt't's Opp'n at 2.

in GASA and MetroGas and, alternatively, . . . [its] rights under or related to the MetroGAS License," Award ¶ 85(a), as well as Article 2(2) of Investment Treaty "by failing to provide BG[Group] fair and equitable treatment and protection and security, . . . by taking unreasonable and discriminatory measures, [and] by failing to observe obligations entered into with regard to BG[Group's] Investments," *id.* ¶ 85(b).

An arbitral panel commenced proceedings in New York and Washington, D.C. beginning in July of 2006. Pet'r's Pet. ¶ 4. On December 24, 2007, the arbitral panel issued a decision in which it rejected BG Group's contention that Argentina breached Section 5 of the Investment Treaty, Award ¶ 269, concluding that there had been no expropriation of BG Group's investment in MetroGAS because "the impact of Argentina's measures [was] not . . . permanent on the value of BG[Group's] shareholding in MetroGAS," and that "MetroGAS'[s] business never halted, continues to operate, and has an asset base which is recovering," *id.* ¶ 270. The panel concluded, however, that Argentina breached Article 2(2) of the Investment Treaty by "fundamentally modif[ying] the investment [r]egulatory [f]ramework," *id.* ¶ 310, and "unilaterally withdr[a]w[ing] commitments which induced BG [Group] to make its investment in Argentina," *id.* ¶ 343.

With regards to assessing the amount of damages owed by Argentina for its breach of Article 2(2), the arbitral panel applied the standard for reparations set forth in *Case Concerning the Factory at Charzow* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, *see* Award ¶ 429, which held that a

party injured by a "breach of engagement" was entitled to "reparation [that], as far as possible, [would] wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if the act had not been committed," *id.* ¶ 425. Applied to this case, the arbitral panel concluded that BG Group was entitled to damages equivalent to the fair market value of its "investment in MetroGAS immediately before and after promulgation of the [emergency measures]," *id.* ¶ 438; *see also id.* ¶ 443 (calculating damages based on the difference between the fair market value of BG Group's investment prior to enactment of the emergency measures and the value of the investment while the measures were in place). On this point, BG Group presented an expert witness, John Wood-Collins, who concluded that the value of BG Group's investment prior to the enactment of the emergency measures was $239,400,000, while the value of the investment after the measures were implemented was $1,300,000. *Id.* ¶ 438. Mr. Wood-Collins's position, therefore, was that BG Group was entitled to $238,100,000 in damages. *Id.*

The arbitral panel rejected Mr. Wood-Collin's figures, concluding that his findings led "to a result [that] is uncertain and speculative." *Id.* ¶ 439. The panel then calculated the damages in this case by relying on two transactions involving the sale of shares in MetroGAS and Gas Argentino, S.A. *Id.* ¶ 443. First, the panel reviewed a transaction that took place after the promulgation of the emergency measures, in which BG Group relinquished part of its interest in MetroGAS (through Gas Argentino, S.A.) in exchange for a debt

write-off, and concluded that the value of BG Group's investment at that time was $91,825.244.15. *Id.* ¶ 440. Second, the panel analyzed a transaction in which the sale of a minority stake in Gas Argentino, S.A., reflected a value of $277,110,730 for BG Group's shares in MetroGAS. *Id.* ¶¶ 441-42. Considering the difference between these two values, the arbitral panel concluded that the damage to BG Group's investment as a result of Argentina's breach of Article 2(2) was $185,285,485.85. *Id.* ¶ 443. The arbitral panel also concluded that BG Group was entitled to interest, *id.* ¶ 467(5), costs for the arbitration, *id.* ¶ 467(6), and attorneys' fees, *id.* ¶ 467(7).

On March 21, 2008, Argentina filed in this Court its petition to vacate or modify the Award under 9 U.S.C. §§ 10-11 and Article V(1)(e) of the New York Convention, *see* Pet'r's Pet. ¶¶ 3-5 (relying on the FAA and New York Convention to vacate or modify the Award), to which BG Group responded with its own motion to have the Award confirmed pursuant to 9 U.S.C. § 9 and Article IV of the Convention, Resp't's Cross-Mot. at 36. On June 7, 2010, this Court issued a memorandum opinion and order denying Argentina's petition to vacate the Award. *Republic of Argentina*, 715 F. Supp. 2d at 126-27. Specifically, the Court rejected Argentina's arguments that "the arbitral panel exceeded its authority under the Investment Treaty," that "the arbitral panel acted 'in manifest disregard of the law,'" that "there was 'evident partiality or corruption' on the part of one of the arbitrators on the panel," that "the Award was procured through corruption, fraud, or undue means," and that "the Award is disproportionate, unfair, and irrational."

Id. at 121. As to BG Group's cross-motion to confirm the Award, the Court noted that Argentina did not set forth its reasons as to why confirmation should be denied; rather, Argentina expressly reserved weighing in on the matter pending further briefing on the issue "'considering the serious violations of public policy' allegedly committed by the arbitral panel." *Id.* at 126 (quoting Pet'r's Reply at 22). Despite the fact "that Argentina could have (and should have) set forth . . . the basis for [denying confirmation] on public policy grounds," the Court granted Argentina leave to file a supplemental memorandum on the issue of whether the Court should deny confirmation of the Award under Article V(2)(b) of the New York Convention.[4] *Id.*

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4. In its prior opinion, the Court imprecisely framed the present issue as "whether *vacatur* is appropriate under Article V(b)(2) of the New York Convention," *Republic of Argentina*, 715 F. Supp. 2d at 126, rather than whether the Court should *confirm* the Award. A proceeding to vacate or modify an arbitral award is distinguishable from one to confirm an award; in point of fact, the purpose of a proceeding to vacate an arbitral award, which can only be held in "the country in which, or under the [arbitration] law of which, [an] award is made," is to render the award unenforceable in any other nation that is a party to the New York Convention, *see TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935-36 (D.C. Cir. 2007) (quoting New York Convention, art. V(1)(e)) (concluding that a "principal precept of the New York Convention" is that "an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully 'set aside' by a competent authority in [the country in] which the award was made"), while a proceeding to confirm an award, which can be held in any other signatory state to the New York Convention, concerns whether an arbitral award—even one that has not been 'set aside' by a competent authority—should

Argentina then filed its supplemental memorandum in support of denying confirmation of the Award on June 30, 2010, relying on Article V(1)(c) of the New York Convention, which states that the Court may deny recognition of an arbitral award "when the award deals with a difference . . . not falling within the terms of the submission to arbitration," in addition to Article V(2)(b). Specifically, Argentina asserts that (1) "[t]he [a]rbitral [t]ribunal exceeded its powers in permitting BG [Group] to arbitrate its claims in blatant disregard of the [p] arties' agreement to arbitrate," Pet'r's 3d Supp. Mem. at 12; (2) the arbitral panel's decision to allow BG Group to bring a claim for "alleged damages suffered . . . by . . . MetroGAS [] in which BG [Group] held . . . shares," *id.* at 13, "is contrary to the public policy of the United States," *id.* at 16; and (3) the arbitral panel's reliance on a 1998 transaction in determining the fair market value of MetroGAS in 2001, *see id.* at 18, is an excessive use of its powers and, moreover, contravenes settled United States public policy because the calculation of actual damages must take into account the injury "suffered as of the time of the wrongful act or the taking []of property[]," *id.* at 22. Additionally, Argentina argued at the September 28, 2010 hearing that the arbitral panel's decision to arbitrate BG Group's claims also violated the public policy of the United States. *See* Tr. 8:20-21:15, Sept. 28, 2010.

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nonetheless be enforced in that particular state, *see Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287 (5th Cir. 2004) (observing that the issue confronting countries "where recognition and enforcement are sought" is "whether that state should enforce the arbitral award").

Not surprisingly, BG Group urges the Court to reject all of these arguments. BG Group asserts that Argentina's attack on the Award as having been made in excess of the arbitral panel's authority "have already been dismissed by the Court," Resp't's 4th Supp. Mem. at 3. As for Argentina's public policy arguments, BG Group contends that Argentina's position is unmeritorious because it has failed to identify any fundamental public policy that implicates "this country's 'most basic notions of morality and justice.'" *Id.* at 7.

II. Standard of Review

Pursuant to 9 U.S.C. § 207, the Court is required to "confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention." Those specified grounds can be found under Article V of the Convention. Specifically, Article V(1) authorizes the Court to deny confirmation of the arbitral award under the following circumstances:

> (a) The parties to the agreement . . . were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
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> (b) The party against whom the award is invoked was not given proper notice of the appointment of

the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Furthermore, Article V(2) of the Convention provides the Court with two additional grounds for denying recognition of an arbitral award:

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> (a) The subject matter of the difference is not capable of settlement by arbitration under [United States] law . . . ; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of [the United States].

As one federal circuit court has observed, "[t]here is now considerable case[]law holding that . . . the grounds for relief enumerated in Article V of the Convention are the *only* grounds available for [denying recognition or enforcement] of a [foreign] arbitral award." *Yusef Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 20 (2d Cir. 1997) (emphasis added) (citing *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 851 (6th Cir. 1996); *Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Industrial Y Comercial*, 745 F. Supp. 172, 181-82 (S.D.N.Y. 1990); *Brandeis Intsel Ltd. v. Calabrian Chems Corp.*, 656 F. Supp. 160, 167 (S.D.N.Y. 1987); and Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 265 (1981)); *see also TermoRio*, 487 F.3d at 935 (D.C. Cir. 2007) (quoting *Yusuf*, 126 F.3d at 23) (concluding that where an enforcement action is brought in a jurisdiction outside of where the arbitral award was rendered, "the state may refuse to enforce the award *only* on the grounds explicitly set forth in Article V of the Convention"). Given that the New York Convention provides only several narrow circumstances when a court may deny confirmation of an arbitral award, confirmation proceedings are generally summary in

nature. *See, e.g., Zeiler v. Deitsch*, 500 F.3d 157, 169 (2d Cir. 2007) ("Confirmation under the Convention is a summary proceeding in nature, which is not intended to involve complex factual determinations, other than a determination of the limited statutory conditions for confirmation or grounds for refusal to confirm."). "[T]he showing required to avoid summary confirmation is high," *Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987), and the burden of establishing the requisite factual predicate to deny confirmation of an arbitral award rests with the party resisting confirmation, *Imperial Ethiopian Gov't v. Baruch- Foster Corp.*, 535 F.2d 334, 336 (5th Cir. 1976); *see also* New York Convention, art. V ("Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes [proof] to the competent authority where the recognition and enforcement is sought . . . .").

The Court also must remain mindful of the principle that "judicial review of arbitral awards is extremely limited," and that this Court "do[es] not sit to hear claims of factual or legal error by an arbitrator" in the same manner that an appeals court would review the decision of a lower court. *Teamsters Local Union No. 61 v. United Parcel Serv., Inc.*, 272 F.3d 600, 604 (D.C. Cir. 2001) (quoting *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175, 1178 (D.C. Cir. 1991)). In fact, careful scrutiny of an arbitrator's decision would frustrate the FAA's "emphatic federal policy in favor of arbitral dispute resolution," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (internal citation omitted)—a policy that "applies with special

force in the field of international commerce," *id.*—by "undermining the goals of arbitration, namely, settling disputes efficiently and avoiding lengthy and expensive litigation," *LaPrade v. Kidder, Peabody & Co.*, 94 F. Supp. 2d 2, 4-5 (D.D.C. 2000) (Sullivan, J.), *aff'd* 246 F.3d 702 (D.C. Cir. 2001). Instead, "a court must confirm an arbitration award where some colorable support for the award can be gleaned from the record." *Id.*

III. Legal Analysis

As the Court noted in its prior memorandum opinion, "[t]he remaining question in this matter . . . is whether the Court should grant BG Group's cross-motion to confirm the Award." *Republic of Argentina*, 715 F. Supp. 2d at 126. Argentina argues that the Award should not be confirmed by the Court because (1) the arbitral panel "completely disregard[ed] the terms of the parties' agreement to submit to arbitration," Pet'r's 3d Supp. Mem. at 6; (2) the arbitral panel improperly allowed BG Group to present a "derivative" claim in contravention of United States and international law, *see id.* at 13-14; and (3) the arbitral panel improperly held Argentina "liable to pay compensation for the consequences of an economic crisis," *id.* at 17. As to the first and third issues, Argentina argues that the arbitral panel exceeded its powers in reaching the conclusions that it did, *see id.* at 12, 22, and that as to all three issues, Argentina contends that recognition of the Award, given these alleged errors, would be contrary to the well-settled public policy of the United States, *see id.* at 16, 18; Tr. 8:20-21:15, Sept. 28, 2010.

Appendix B

As an initial matter, the Court has serious doubts about whether Article V(1)(c) of the New York Convention authorizes this Court to deny confirmation of the Award on the ground that the arbitral panel exceeded its powers. Unlike Section 10(a)(4) of the FAA, which states that an award may be vacated "where the arbitrators exceeded their powers," Article V(1)(c) is not so broad; rather, Article V(1)(c) authorizes the Court to deny confirmation of an award if "[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration." *See also Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 976 (2d Cir. 1974) (recognizing that Article V(1)(c) "tracks in more *detailed* form [Section] 10(d) of the Federal Arbitration Act . . . which authorizes vacating an award 'where the arbitrators exceeded their powers'" (emphasis added));[5] *Mgmt. & Technical Consultants S.A. v. Parsons-Jurden Int'l Corp.*, 820 F.2d 1531, 1534 (9th Cir. 1987) ("[I]t is generally recognized that the [New York] Convention tracks the Federal Arbitration Act." (internal citation omitted)). Put differently, a situation where an arbitrator "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration," New York Convention, art. V(1)(c), is just one "detailed" example of a broader category of acts that can be considered an excessive use of power by an arbitrator under Section 10(a)(4) of the FAA. But

5. Section 10(d) of the FAA was re-designated as Section 10(a)(4) in 1990. *See, e.g.*, S. Rep. No. 101-543, at 24 (1990).

arguably, it is only that specific scenario, not other actions that would be encompassed under Section 10(a)(4), that is covered under the New York Convention. Indeed, where an arbitral award is issued by an arbitrator who exceeds his powers by acting in "manifest disregard of the law," *see Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1281 (9th Cir. 2009) ("[A]n arbitrator's manifest disregard of the law remains a valid ground for vacatur of an arbitration award under [Section] 10(a)(4) of the [FAA]."),[6] at least one other court has found that such an award cannot be denied confirmation under Article V of the Convention,[7] *see M & C Corp.*, 87 F.3d at 851

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6. In *Hall Street Associates LLC v Mattel, Inc.*, 552 U.S. 576 (2008), the Supreme Court called into question the continuing viability of the "manifest disregard of the law" standard as a non-statutory basis for vacatur of an arbitral award. *See id.* at 584 (concluding that Sections 10(a) and 11 of the FAA "provide the . . . *exclusive* grounds for expedited vacatur and modification" of an arbitral award); *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, __U.S. __, __,130 S. Ct. 1758, 1768 n.3 (2010) (declining to decide whether the "manifest disregard of the law" standard survived *Hall Street Associates*). While the Ninth Circuit has continued to recognize the "manifest disregard of the law" standard after *Hall Street Associates*, *see Comedy Club*, 553 F.3d at 1281, the District of Columbia Circuit has yet to address this issue, *see Regnery Pub., Inc. v. Miniter*, No. 09-7039, 2010 WL 1169843, at *1 (D.C. Cir. Mar. 17, 2010) (assuming, without deciding, that the "manifest disregard of the law" standard survived *Hall Street Associates*).

7. In fact, this appears to be the exact argument that Argentina is pursuing here—not that the arbitrator resolved a dispute falling outside the scope of the arbitration, but that the panel deliberately ignored the terms of the Investment Treaty and applicable principles of international law.

(concluding that "Article V of the [New York] Convention lists the exclusive grounds justifying refusal to recognize an arbitral award," and that "[t]hose grounds . . . do not include . . . manifest disregard of the law"). Thus, the plain language of Article V(1)(c) does not appear to have the far reach that Argentina desires.

Nonetheless, the Court need not conclusively decide whether Article V(1)(c) allows the Court to deny recognition of an arbitral award in every instance where an arbitration panel (or an individual arbitrator) exceeds its powers, because even assuming that Article V(1)(c) can be interpreted so broadly, the Court already concluded in its earlier memorandum opinion in this case that the arbitral panel did not exceed its powers during the course of the arbitration that is the subject of this case. *See Republic of Argentina*, 715 F. Supp. 2d at 121. While the Court previously examined the arbitral panel's exercise of power in the context of whether the Award should be vacated under Section 10(a)(4) of the FAA, *see, e.g.*, *id.* at 121 ("Argentina asserts that the Court must vacate the Award under Section 10(a)(4) because, *inter alia*, the arbitral panel improperly 'permit[ed] BG [Group] to arbitrate its claims' before seeking recourse in the Argentine courts[,] . . . and . . . that the arbitral panel wrongfully rejected 'the discounted cash flow method' in calculating the amount of the Award" (internal citations omitted)), the fact that Argentina now relies on Article V(1)(c) of the New York Convention makes no difference. The upshot of the Court's earlier opinion is that the arbitral panel did not exceed its powers, and that conclusion has the same legal effect whether Argentina relies on Section

10(a) of the FAA, or Article V(1)(c) of the New York Convention. And, because Argentina fails to provide any reason why the Court should revisit its prior ruling, Argentina's attempt to deny confirmation of the Award under Article V(1)(c) must be rejected. *See Lemmons v. Georgetown Univ. Hosp.*, 241 F.R.D. 15, 22 (D.D.C. 2007) (Walton, J.) (quoting *Judicial Watch v. Dep't of Army*, 466 F. Supp. 2d 112, 123 (D.D.C. 2006) (Urbina, J.)) ("[W]here litigants have once battled for the Court's decision, they should neither be required, nor without good reason permitted, to battle for it again.").

Turning to the issue of whether recognition of the Award would be contrary to the public policy of the United States, the Court finds it helpful to review some foundational and relevant legal principles in this regard. "The public policy defense" under the New York Convention "is to be construed narrowly [and] applied only where enforcement would violate the forum state's most basic notions of morality and justice." *TermoRio*, 487 F.3d at 938 (quoting *Karaha Bodas Co.*, 364 F.3d at 305-06). More specifically, the Court's authority to deny recognition of an arbitral award under the New York Convention "is limited to situations where the contract *as interpreted* [by the arbitrators] would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Banco de Seguros Del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 264 (2d Cir. 2003) (emphasis added and alteration in original) (quoting *United Paperworks Int'l Union v. Misco, Inc.*,

484 U.S. 29, 43 (1987)). This does not mean, however, that an arbitral award may be denied confirmation simply because it violates some statute in existence in the United States. As one court noted:

> All laws, be they procedural or substantive, are founded on strong policy considerations. Yet not all laws represent this country's "most basic notions of morality and justice." Were it otherwise, the Convention's public policy exception would eviscerate the very goal of the Convention as a whole—to encourage the recognition and enforcement of commercial arbitration agreements.

A. Halcoussis Shipping Ltd. v. Golden Eagle Liberia Ltd., Civil Action No. 88-4500 (MJL), 1989 WL 115941, at *2 (S.D.N.Y. Sept. 27, 1989). Given the public policy defense's narrow application, the burden of establishing that an arbitral award is contrary to public policy "is high, and infrequently met," *Ackermann v. Levine*, 788 F.2d 830, 841 (2d Cir. 1986); and "[o]nly in clear[]cases" should the party seeking to deny confirmation of an arbitral award prevail, *Tahan v. Hodgson*, 662 F.2d 862, 866 n.17 (D.C. Cir. 1981); *see also Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan*, 190 F. Supp. 2d 936, 955 (S.D. Tex. 2001) ("Application of the public policy exception will succeed in only the narrowest of circumstances . . . ."). With these principles serving as the Court's touchstone, the Court turns to each of the contentions raised by Argentina in both its supplemental memorandum and at the September 28, 2010 hearing.

Appendix B

A. The Arbitrability of the Dispute

Argentina argues that the Court should deny confirmation of the arbitral award under Article V(b)(2) because it did not consent to arbitrate this dispute. From Argentina's perspective, the Court must first "second guess" the arbitral panel's conclusion that this dispute was arbitrable, *see* Tr. 4:11-15, Sept. 28, 2010 ("THE COURT: But why should I question the [a]rbitration [p]anel's decision as to its authority to issue the arbitration award? You're not suggesting I should second[-]guess that, are you? MR. BOTTINI: Yes, Your Honor, we are saying that."), and instead adopt its interpretation that Argentina's consent to arbitrate this dispute rested on the condition that "the dispute had to be submitted for [eighteen] months to . . . an Argentine judge," *id.* at 5:5-7, *id.* at 7:15-18. Then, Argentina urges the Court to find that because this condition was not met, it therefore did not consent to arbitrate this dispute, and thus enforcement of the Award would contravene the principle that "arbitration of a particular dispute" is to occur only when "the parties agreed to arbitrate *that dispute*." *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, __U.S. __, __, 130 S. Ct. 2847, 2856 (2010); *see also Stolt- Nielsen*, __U.S. at __, 130 S. Ct. at 1773 (recognizing "the basic precept that arbitration 'is a matter of consent, not coercion'" (quoting *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

Argentina's analytical approach is flawed, however. As the authorities cited above command, the Court is without authority to deviate from the arbitral panel's

interpretation of the Investment Treaty in determining whether enforcement of the Award would contravene the public policy of the United States. Rather, the Court must accept as correct the arbitral panel's construction of the Investment Treaty in determining whether the agreement violates public policy. *See Banco de Seguros Del Estado*, 344 F.3d at 264 (quoting *United Paperworks Int'l Union*, 484 U.S. at 43) (holding that the question to be resolved on a challenge under Article V(2)(b) is whether "the contract *as interpreted* would violate some explicit public policy" (emphasis added)); *cf. Nat'l R.R. Passenger Corp. v. Consol. Rail Corp.*, 892 F.2d 1066, 1070 (D.C. Cir. 1990) (quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of America*, 461 U.S. 757, 766 (1983)) (concluding in the context of the FAA that it is the duty of the courts to resolve "question[s] of public policy [that are] implicated under the contract *as interpreted*" (emphasis added)). Besides, in a case such as this one, in which Argentina "acknowledge[s] that the [a]rbitral [panel] has the principal power to rule upon its jurisdiction,"[8] Tr. 4:2-3, Sept. 28, 2010, any extensive judicial review of the

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8. To be sure, the issue of whether the parties in a dispute "have agreed to submit a particular dispute to arbitration" is one that is "typically an issue for judicial determination." *Granite Rock*, __ U.S. at __, __, 130 S. Ct. at 2855 (internal quotation marks omitted). Only where the record reflects a "clear and unmistakable" intention by the parties to arbitrate arbitrability would that issue fall outside the reach of the courts. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Given Argentina's concession that the arbitral panel had the authority to rule on its own jurisdiction, however, the Court need not decide whether "clear and unmistakable evidence" exists in this case.

panel's interpretation of the Investment Treaty would be contrary to the Supreme Court's ruling in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). There, the Supreme Court observed that where

> the parties agree[d] to submit the arbitrability question . . . to arbitration . . . . then the court's standard for reviewing the arbitrator's decision about that matter should not differ from the standard courts apply when they review any other matter that [the] parties have agreed to arbitrate . . . . That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances [, e.g., Section 10 of the Federal Arbitration Act].

Id. at 943 (citing 9 U.S.C. § 10). In other words, where the parties have conferred upon the arbitrator the authority to determine whether the dispute is arbitrable, then judicial review of that decision "is extremely limited," and this Court is without authority "to hear claims of factual or legal error by an arbitrator." *Teamsters Local Union No. 61*, 272 F.3d at 604 (quoting *Kanuth*, 949 F.2d at 1178). Thus, it is the arbitral panel's interpretation of the Investment Treaty, and not Argentina's (or this Court's), that controls the Court's analysis.

Accepting, as it must, the arbitral panel's construction of the Investment Treaty, it is evident to the Court that Argentina was not compelled to arbitrate this dispute without its consent, and thus there was no violation of

the principle set forth in *Granite Rock*.[9] Here, the arbitral panel concluded that Article 8(2)(a)(i) of the Investment Treaty, as agreed to by both the United Kingdom and Argentina, allowed BG Group to submit its claim to arbitration without first seeking recourse before the Argentine courts. *See* Award ¶ 157 ("The Tribunal . . . finds admissible the claims brought by BG [Group] in this arbitration . . . ."). Although the arbitral panel acknowledged that Article 8(2)(a)(i) requires claimants, as a general matter, to "litigate in the [Argentine] courts for [eighteen] months before they can bring their claims to arbitration," *id.* ¶ 146, it found that "[a]s a matter of treaty *interpretation*, . . . Article 8(2)(a)(i) cannot be *construed* as an absolute impediment to arbitration," *id.* ¶ 147. This, the arbitral panel concluded, is because it must apply both the terms of the "treaty itself, [as well as] the applicable principles of international law," *id.* ¶ 90, and if Article 8(2)(a)(i) were read to require BG Group to seek relief before the Argentine courts even where Argentina passed measures that were essentially meant "to bar recourse to the courts," *id.* ¶ 148, that "*interpretation* would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention," *id.* ¶ 147 (emphasis added).[10] Thus, the arbitral panel concluded

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9. Consequently, the Court finds it unnecessary to decide whether the issuance of an arbitral award, despite a finding by an arbitral panel (or individual arbitrator) that one or both of the parties did not consent to the arbitration, is one that contravenes this country's "most basic notions of morality and justice." *TermoRio*, 487 F.3d at 928 (quoting *Karaha Bodas Co.*, 364 F.3d at 305-06).

10. As the Court noted in *Republic of Argentina*, 715 F. Supp. 2d at 122:

that Article 8(2)(a)(i), when viewed in light of Article 32's directive to interpret treaty provisions to avoid an "absurd and unreasonable result," did not require recourse to the Argentine Courts for eighteen months as Argentina had made attempts "to unilaterally elude arbitration." *Id.* Based on that interpretation, therefore, it cannot be said that Argentina's participation in the arbitration was without its consent; to the contrary, the arbitral panel concluded that Article 8(2)(a)(i), as agreed to by Argentina, allows for direct recourse to arbitration. Accordingly, enforcement of the Award does not offend the notion that "[a]rbitration is strictly a matter of consent," *Granite Rock*, __U.S. at __, 130 S. Ct. 2847, 2857, and thus the Court rejects Argentina's efforts to prevent confirmation of the Award on this basis.

B. BG Group's "Derivative" Claims

Next, Argentina argues that the arbitral panel's decision to allow BG Group to directly proceed against

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Article 32 of the Vienna Convention on the Law of Treaties, to which Argentina is a signatory, provides that "[r]ecourse may be had to supplementary means of interpretation" when standard means of treaty interpretation would "leave[ ] the meaning [of the provision] ambiguous or obscure[,] or ... lead[ ] to a result which is manifestly absurd or unreasonable." The arbitral panel was authorized, if not compelled, to resort to sources of international law in construing Article 8(2)(a)(i) of the Investment Treaty. *See* Investment Treaty, art. 8(4) (requiring "[t]he arbitral tribunal [to] decide the dispute in accordance with the provisions of [the Investment Treaty] and the applicable principles of international law").

Argentina on a "derivative claim[] . . . is contrary to the public policy of the United States of America." Pet'r's Supp. Mem. at 16. Specifically, Argentina asserts that it was MetroGAS that directly suffered harm as a result of the various measures enacted in 2002, *id.* at 13, and that any damages suffered by BG Group were limited to the decrease in the value of its shares in Gas Argentino, S.A. and MetroGAS, *id.* at 12. Argentina further contends that it is well-established in both international and United States jurisprudence that "a shareholder does not have an individual cause of action against third parties for wrongs or injuries to the corporation in which he or she holds stock," *id.* at 14, and that the adjudication of this claim by the arbitral panel, therefore, violates this principle, *id.* at 16.

The Court agrees with Argentina that, as a general matter, a shareholder cannot "maintain a direct action when the alleged injury is inflicted on the corporation and the only injury to the shareholder is the indirect harm which consists of the diminution in the value of his or her shares." *Lapidus v. Hecht*, 232 F.3d 679, 683 (9th Cir. 2000); *see also Labovitz v. Washington Times Corp.*, 172 F.3d 897, 902 (D.C. Cir. 1999) (recognizing the "general principle[] of corporate law" that a shareholder "cannot recover on account of injury done to the corporation" (internal quotation marks omitted)). But what Argentina fails to recognize is that there are numerous exceptions to this rule, including where "a special contractual duty exists." *Nocula v. UGS Corp.*, 520 F.3d 719, 726 (7th Cir. 2008); *see also Oliver v. Sealaska Corp.*, 192 F.3d 1220, 1226 (9th Cir. 1999) (recognizing that a direct action can

be maintained by a shareholder where, *inter alia*, "there is a special duty, such as a contractual duty"). Moreover, such a duty can be owed to a third-party beneficiary to a contract, so long as "the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly."[11] *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001).

These principles, when applied to the facts of this case, refute Argentina's argument that BG Group could not bring a direct action against it under the Investment Treaty. There is no question that Argentina, as a "contracting party," directly owed BG Group, an "investor," the duty under the Investment Treaty to refrain from enacting "unreasonable or discriminatory measures" that would "impair . . . the management, maintenance, use, enjoyment, or disposal of investments in its territory."[12] Investment Treaty, art. 2(2). BG

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11. The principles detailed in these cases are applicable in the present case because the Investment Treaty is at its very essence a contractual agreement between Argentina and the United Kingdom. *See, e.g., Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984) ("A treaty is in the nature of a contract between nations").

12. In fact, Argentina owed BG Group a litany of other duties under the Investment Treaty. *See* Investment Treaty, art. 2(1) ("Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to invest capital in its territory, and . . . shall admit such capital."); *id.*, art. 3(1) ("Neither Contracting Party shall in its territory subject investments or returns of investors of

Group is, therefore, a third-party beneficiary under the Investment Treaty,[13] and the arbitral panel's decision to

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the other Contracting Party to treatment less favourable than which it accords to investments or returns of its own investors or to investments or returns of investors of any third State."); *id.*, art. 3(2) ("Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment[,] or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third State."); *id.*, art. 4 ("Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to . . . a state of national emergency . . . shall be accorded by the latter Contracting Party treatment . . . no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State."); *id.*, art. 5(1) ("Investments of investors of either Contracting Party shall not be nationalised, expropriated[,] or subjected to measures having [the same] effect . . . in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Contracting Party on a non- discriminatory basis," and in such cases the investor "shall have a right . . . to prompt review[] by a judicial or other independent authority of that Contracting Party."); *id.*, art. 6(1) ("Each Contracting Party shall in respect of investments guarantee to investors of the other Contracting Party the unrestricted transfer of their investments and returns to the country where they reside.").

13. Although BG Group was not explicitly identified in the Investment Treaty as a beneficiary of the agreement, that is of no moment here. *See, e.g.*, *Synovus Bank of Tampa Bay v. Valley Nat'l Bank*, 487 F. Supp. 2d 360, 368 (S.D.N.Y. 2007) ("While the third-party beneficiary does not have to establish that it is explicitly mentioned in the contract, New York law requires that the parties' intent to benefit a third-party be shown on the face of the contract.").

entertain BG Group's direct action against Argentina for enacting "unreasonable [and] discriminatory measures" that "impair[ed]" BG Group's investment, Investment Treaty, art. 2(2); Award ¶ 413, is *consistent* with, rather than contrary to, well-settled principles of American jurisprudence.[14] As a consequence, the Court rejects Argentina's "derivative claim" argument.

C. The Arbitral Panel's Damages Assessment

Finally, Argentina asserts that the arbitral panel's assessment of damages in this case is contrary to the public policy of the United States. Pet'r's 3d Supp. Mem. at 17. It is important to note here that, as far as the Court can tell, Argentina does not dispute the general rule applied by the arbitral panel in assessing the award of damages in this case, to wit, the difference in the value of BG Group's "investment in MetroGAS immediately before and after promulgation of the [emergency measures]," Award ¶ 438; *see also id.* ¶ 443 (calculating damages based on the difference between the value of BG Group's investment prior to enactment of the emergency measures and the value of the investment after Argentina's measures were in place). What Argentina does take issue with is what it believes to be the arbitral panel's failure to assess the

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14. Because the Court concludes that enforcement of the Award would not violate any general principle of corporate law recognized by the courts of this country, it need not resolve the question of whether enforcement of an arbitral award that would contravene this principle would be contrary to this country's "most basic notions of morality and justice." *TermoRio*, 487 F.3d at 928 (quoting *Karaha Bodas Co.*, 364 F.3d at 305-06).

fair market value of BG Group's shares in MetroGAS as of the date when the emergency measures went into effect, Pet'r's 3d Supp. Mem. at 22, which was January 6, 2002, Pet'r's Pet. at 6-7; Respt't's Cross-Mot. at 2. Specifically, Argentina argues that the arbitral panel should have appraised the value of BG Group's investment on "the day before the [emergency] measures" were taken, Tr. 17:7, Sept. 28, 2010, when the Argentine economy had already collapsed, Pet'r's 3d Supp. Mem. at 18, instead of assessing "the value of BG[Group's] stake in MetroGAS in 1998 . . . . when the Argentine economy was at its peak," *id.* at 18, by relying on the July 12, 1998 transaction involving the sale of Gas Argentino, S.A. shares, Award ¶ 441. Argentina asserts that the arbitral panel's valuation of BG Group's investment resulted in Argentina being "held responsible . . . for the effects of the economic crisis it suffered between 1998 and 2001," and thus the arbitral panel's ruling conflicts with both the principle that "[a]ctual pecuniary loss sustained as a direct result of the wrong is the measure to be applied in fixing damages," Pet'r's 3d Supp. at 22 (citing *Ainger v. Michigan General Corp.*, 476 F. Supp. 1209, 1233 (S.D.N.Y. 1979)),[15] as well

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15. Argentina also cites *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951), as standing for the proposition that "[a]ctual pecuniary loss sustained as a direct result of the wrong is the measure to be applied in fixing damages." Pet'r's 3d Supp. at 22. The case, however, has little, if anything, to do with the appropriate standard to be applied in calculating damages. Rather, the issue confronting the Supreme Court in *Finn* was to determine what is "the proper federal rule to be followed on a motion by a defendant to vacate a United States District Court judgment, obtained by a plaintiff after removal from a state court by [a] defendant, and to remand the suit to state court." *Finn*, 341 U.S. at 7.

as the Fifth Amendment's guarantee of entitlement to only "just compensation" for the taking of property, *see* Tr. 15:21-25, Sept, 28, 2010 (asserting that "the guiding principle of just compensation and the [T]akings [C]lause of the Fifth Amendment is that the owner of the condemned property must be made whole[,] but is entitled to no more").

These arguments are without merit. For starters, Argentina distorts the arbitral panel's reliance on the 1998 transaction. At the onset of its analysis regarding Mr. Wood-Collins's damages assessment, the arbitral panel observed that he

> a) assessed the loss in the fair market value of BG[Group's] investment in MetroGAS as [of] January 2002; [and]
>
> b) adjusted the result of (a) above to account for the part of the loss which might be borne by the creditors of [Gas Argentino, S.A.] and calculated BG[Group's] "historical loss" for the period of January 2002 to December 2005.

Award ¶ 430. At no point in its analysis, however, did the arbitral panel take issue with Mr. Wood-Collins's conclusion that January 1, 2002, should be the starting point for measuring the loss in BG Group's investment. Award ¶ 438. Rather, the only concern expressed by the arbitral panel regarding Mr. Wood-Collin's assessment of the fair market value of BG Group's investment was that his figures were "uncertain and speculative." *Id.* ¶ 439.

The panel concluded that the more "objective indication of the value of BG[Group's] investment," *id.* ¶ 440, were actual transactions that reflected MetroGAS's fair market value, *id.* ¶ 443 (noting that the arbitral panel's calculation of damages was "based on *actual* transactions") (emphasis added)); specifically, the cancellation of debt totaling $38,200,000 "in exchange for an 18.8% interest in MetroGAS that took place after the enactment of Argentina's emergency measures, *see id.* (concluding that the "Ashmore/Marathon transaction . . . . provides an objective indication of the value of BG[Group's] investment *after* the Emergency Law"), and the sale of a 25% interest in Gas Argentino, S.A. for $75,000,000, *id.* ¶ 442 (concluding that a 1998 transaction involving an interest in MetroGAS "is also a better proxy of the value of BG[Group's] investment before promulgation of the Emergency Law"). It is not the case, therefore, that the arbitral panel found that July 12, 1998, was the appropriate date from which to measure the damages suffered by BG Group; instead, the panel agreed (albeit implicitly) with Mr. Wood- Collins that January 1, 2002, was the starting point for calculating the damages in this case, but in reaching this conclusion, it found that the value of MetroGAS's shares, as reflected by the July 12, 1998 transaction, was a "better proxy of the value of BG[Group's] investment before promulgation of the [e] mergnecy [l]aw." Award ¶ 442.

As a practical matter, this analytical distinction makes little difference because under the arbitral panel's calculus, its exclusive reliance on the July 12, 1998 transaction has the result of equating the value of

Appendix B

BG Group's investment in MetroGAS in 1998 with the value of that investment on January 1, 2002. As a legal matter, however, this distinction is significant. Had the arbitral panel concluded that July 12, 1998, was the correct starting point to measure the damages suffered by BG Group, even though the act that caused the injury—the promulgation of the emergency law—occurred on January 1, 2002, then Argentina would have a colorable argument that it is being held accountable for something more than just "the actual pecuniary loss sustained as a direct result of the wrong." *Ainger*, 476 F. Supp. at 1233. But, because the arbitral panel measured the fair market value of BG Group's investment in MetroGAS as of January 1, 2002, Argentina's challenge must not be directed at the date at which the panel measured the damages, but rather at the fact that the arbitral panel relied on the 1998 transaction to appraise the fair market value of BG Group's investment in MetroGAS in 2001. Given that the employment of the "fair market value" standard "as a measuring device in the workaday world of business" does not include resorting to "the equivalent of a precise scientific formula," *McDonald v. Comm'r*, 764 F.2d 322, 330 (5th Cir. 1985); *see also BMW of North America v. United States*, 39 F. Supp. 2d 445, 447 (D.N.J. 1998) (observing that "the determination of 'fair market value' is not an exact science, and that reasonable persons . . . could reach different conclusions with respect to . . . 'fair market value'"); *In re Air Vermont, Inc.*, 41 B.R. 486, 491 (Bankr. D. Vt. 1984) ("It is generally known that determination of the fair market value . . . by appraisal is not an exact science."), this value assessment "is necessarily one of fact to be determined by the evidence,"

Crawford v. Helvering, 70 F.2d 744, 745 (D.C. Cir. 1934) (per curiam). And, in considering whether enforcement of the Award is contrary to public policy, the Court is without authority to conduct "an exercise in factfinding," *United Paperworkers Int'l Union*, 484 U.S. at 44, as "[t]he parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them," *id.* at 45. The Court, therefore, cannot second-guess the arbitral panel's reliance on the 1998 transaction in determining the fair market value of BG Group's investment in MetroGAS on January 1, 2002, and because the panel appraised the value of the investment as of the date that Argentina enacted the emergency measures that ultimately caused monetary harm to BG Group, the Court cannot conclude that enforcement of the Award would contravene any principle in *Ainger*.[16]

Neither does the Award contravene the principle of "just compensation" as set forth in the Fifth Amendment. The Takings Clause of the Fifth Amendment "prohibits *the government from taking private property for public use* without just compensation." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (emphasis added). For the Court to find that enforcement of the Award would offend the policy of the "just compensation" mandate of

16. Finding no inconsistency between the arbitral panel's ruling and the principles set forth in *Ainger*, the Court need not resolve the question of whether an arbitral award that imposes damages in excess of actual pecuniary loss would be contrary to this country's "most basic notions of morality and justice." *TermoRio*, 487 F.3d at 928 (quoting *Karaha Bodas Co.*, 364 F.3d at 305-06).

the Fifth Amendment, the Court would have to conclude (1) that there was a government taking; (2) that the taking was of private property for public use; and (3) that the taking occurred without providing "just compensation." U.S. Const., amend. V. It had been Argentina's position during the arbitration proceeding, however, that no government expropriation occurred in this case. *See* Award ¶ 252 ("Argentina denied that any expropriation under Article 5 of the [Investment Treaty] has occurred."). Indeed, the arbitral panel sided with Argentina on this point, reasoning that "the impact of Argentina's measures has not been permanent on the value of BG[Group's] shareholding in MetroGAS," as the "business never halted, continues to operate, and has an asset base which is recovering." Award ¶ 270. Thus, enforcement of the Award cannot be said to be contrary to the Takings Clause when, as Argentina successfully demonstrated in the arbitration, there had been no improper government expropriation of BG Group's investment.[17]

To the extent Argentina is asserting that the arbitral panel's issuance of the Award itself violates the Takings Clause and contravenes the public policy of the United States, that position is also without merit. Of course, the arbitral panel is not an arm of any government, and thus any decision rendered by it could not constitute a "government taking." But even assuming that the arbitral

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17. The Court takes no position on whether enforcement of an arbitral award that fails to comport with the Takings Clause would contravene this country's "most basic notions of morality and justice." *TermoRio*, 487 F.3d at 928 (quoting *Karaha Bodas Co.*, 364 F.3d at 305-06).

panel, as a quasi-judicial body, *see, e.g.*, *Portland Gen. Elec. Co. v. U.S. Bank Trust Nat'l Assoc.*, 218 F.3d 1085, 1090 (9th Cir. 2000) (observing that an "arbitrator plays a quasi-judicial role" in conducting an arbitration), could be viewed as a governmental entity, the Supreme Court noted in *Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection*, __ U.S.__, __, 130 S. Ct. 2592, 2604 (2010), that no clear standard exists for what constitutes a "judicial taking, or indeed whether such a thing as a judicial taking even exists." It cannot be said, therefore, that the arbitral panel's issuance of the Award was an act that "violate[d] some explicit public policy that is *well defined and dominant*." *Banco de Seguros Del Estado*, 344 F.3d at 264 (quoting *United Paperworkers Int'l Union*, 484 U.S. at 43) (emphasis added). Accordingly, if Argentina's position is that the issuance of the Award itself offends the Takings Clause and precludes confirmation of the Award, that argument also fails.

IV. Conclusion

"A judgment is unenforceable as against public policy to the extent that it is 'repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.'" *Ackermann*, 788 F.2d at 841 (quoting *Tahan*, 662 F.2d at 864). Argentina's attempts to convince the Court to deny confirmation of the Award fall exceedingly short of this standard. Indeed, Argentina failed to establish that the arbitral panel's interpretations of the Investment Treaty contravened *any* well-settled law or case precedent, let alone that its rulings were contrary to a

principle so inextricably woven into the fabric of American jurisprudence to warrant this Court's intervention. Having failed to meet "the showing required to avoid summary confirmation," *Ottley*, 819 F.2d at 376, the Court concludes that the Award must be confirmed, and that BG Group is entitled to damages of $185,285,485.85, along with interest, costs for the arbitration, and attorneys' fees.[18]

SO ORDERED on this 21st day of January, 2011.[19]

REGGIE B. WALTON
United States District Judge

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18. According to BG Group's calculation, the total award including interest and attorneys' fees as of July 2010, was $233,344,409.91. Resp't's 4th Supp. Mem., Ex. 1 (July 21, 2010 Declaration of Elliot Friedman) Ex. A. Presumably, BG Group will seek an award of interest that will include the time period between July 2010, and the date of the final order confirming the Award. The parties, therefore, shall appear before the Court for a hearing at 2:00 p.m. on February 3, 2011, for the purpose of determining the appropriate amount of interest payments owed by Argentina to BG Group as of the date of the hearing. An order to this effect will be issued contemporaneously with the issuance of this memorandum opinion.

19. A final order will be issued at the conclusion of the February 3, 2011 hearing (1) granting BG Group's cross- motion to confirm the Award; (2) entering final judgment in favor of BG Group and against the Republic of Argentina in the amount of $185,285,485.85, plus an amount of interest to be determined at the February 3, 2011 hearing.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED JUNE 7, 2010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 08-485 (RBW)

REPUBLIC OF ARGENTINA,

Plaintiff,

v.

BG GROUP PLC,

Defendant.

MEMORANDUM OPINION

The Republic of Argentina ("Argentina"), the petitioner in this case, seeks to vacate or modify an arbitral award (the "Award") rendered against it and in favor of respondent BG Group PLC ("BG Group") under the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (2006) (the "FAA"). Petition to Vacate or Modify Arbitration Award (the "Petition" or "Pet'r's Pet.") ¶ 3. In response, BG Group filed a cross-motion to confirm the Award under the FAA and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *available at* 1970 WL 104417 (the "New York Convention" or the "Convention"), which was

ratified by Congress and codified at 9 U.S.C. §§ 201-08 (2006). Cross-Motion for Recognition and Enforcement of Arbitral Award (the "Resp't's Cross-Mot.") at 1. After carefully considering Argentina's petition to vacate or modify the Award, BG Group's cross-motion to confirm the Award, and all relevant documents and exhibits attached to those submissions,[1] the Court concludes for the reasons below that it must deny Argentina's petition to vacate or modify the Award.

I. Background

During the late 1980s and early 1990s, Argentina undertook a "wide [economic] reformation process," which

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1. In addition to Argentina's petition and BG Group's cross-motion, the Court considered the following documents in reaching its decision: (1) Argentina's Memorandum of Points and Authorities in Reply to Respondent's Opposition to the Motion to Vacate or Modify Arbitration Award and in Opposition to Respondent's Cross-Motions for Confirmation of the Award and For a Pre-Judgment Bond (the "Pet'r's Reply"); (2) BG Group's Memorandum of Points and Authorities in Reply to Petitioner's Opposition to Respondent's Cross-Motion for Recognition and Enforcement and for a Pre-Judgment Bond (the "Resp't's Reply"); (3) BG Group's Supplemental Memorandum of Law in Support of Respondent's Motion for Pre-Judgment Bond (the "Resp't's Supp. Mem."); (4) Argentina's Supplemental Memorandum of Points with Regard to Posting a Bond (the "Pet'r's Supp. Mem."); (5) Argentina's Second Supplemental Memorandum of Points with Regard to Posting of Bond (the "Pet'r's 2d Supp. Mem."); (6) BG Group's Supplemental Memorandum of Law on the Applicability of the New York Convention (the "Resp't's 2d Supp. Mem."); and (7) BG Group's Supplemental Memorandum in Support of Respondent's Motion for a Pre-Judgment Bond (the "Resp't's 3d Supp. Mem.").

included entering into numerous bilateral investment treaties with various foreign nations in the hopes of attracting foreign investors. Resp't's Cross-Mot. at 1; Pet'r's Pet. ¶ 13. One of the treaties entered into during this period was the Agreement for the Promotion and Protection of Investments, Arg.-U.K., Dec. 11, 1990, 1765 U.N.T.S. 33 (the "Investment Treaty"), between Argentina and the United Kingdom. Resp't's Cross-Mot. at 1; Pet'r's Pet. ¶ 13. Similar to other bilateral investment treaties, the Investment Treaty was designed to ensure foreign investors that they would be treated fairly and equitably, to provide them with "full protection and security," and to restrict the host country "from expropriating the assets of such investors without just compensation." Resp't's Cross-Mot. at 1. To address any disputes arising from these investments, Argentina and the United Kingdom agreed to a two- tiered system of dispute resolution in which the dispute could be submitted to a "competent tribunal" of the country "in whose territory the investment was made," after which the matter could be referred to arbitration under certain conditions, or the dispute could be submitted directly to international arbitration. Investment Treaty, art. 8(2).[2]

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2. Article 8(2) of the Investment Treaty provides for recourse to arbitration under the following circumstances:

> (a) if one of the Parties so requests . . .:
>
> > (i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to [a] competent tribunal of the [country] in whose territory the investment was made . . . ;

Appendix C

Also as part of its economic reforms, Argentina enacted several measures in an effort "to reduce inflation and the public deficit," including "privatization of certain state[-]owned companies in many sectors[,] including the gas transportation and distribution industry." Pet'r's Pet. ¶ 15. As part of these efforts, Argentina divided its gas transportation and distribution industry, Gas del Estado, Sociedad del Estado, into two transportation companies and eight distribution companies. *Id.* ¶ 18. BG Group, a United Kingdom company, invested in one of the eight distribution companies, MetroGAS, through a consortium of investors known as Gas Argentino, S.A. *Id.* ¶ 20. Eventually, BG Group acquired a 54.67% interest in Gas Argentino, S.A., which in turn owned 70% of MetroGAS. *Id.* ¶ 21.

(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;

(b) where the [Parties] have so agreed.

Furthermore, the Investment Treaty provides that "where the dispute is referred to international arbitration," the parties "may agree to refer the dispute either to: (a) the International Centre for the Settlement of Investment Disputes [(the "ICSID")] . . . or (b) an international arbitrator or *ad hoc* arbitration tribunal . . . under the Arbitration Rules of the United Nations Commission on International Trade Law [(the "UNCITRAL Rules")]. Award at 6 (citing Article 8(3)(a)-(b) of the Treaty). Here, "[b]ecause the [p]arties failed to agree on submission of the dispute to the . . . []ICSID[], BG [Group] submitted to arbitration under . . . []the UNCITRAL Rules[]." *Id.* at 7.

Appendix C

In 2001, after a period of exceptional economic growth, Argentina began to experience an economic crisis. Pet'r's Pet. at 6-7. In its efforts to respond to this predicament, Argentina enacted an emergency law in 2002, implementing regulatory measures that negatively impacted BG Group's investment in MetroGAS. *Id.*; Resp't's Cross-Mot. at 2. Pursuant to the Investment Treaty, BG Group initiated international arbitration proceedings on April 25, 2003.[3] Resp't's Cross-Mot. at 2; Pet'r's Pet. ¶ 6. An arbitral panel commenced proceedings in New York and Washington, D.C. beginning in July of 2006. Pet'r's Pet. ¶ 4.

Argentina raised a number of objections at the outset of the arbitration. First, Argentina objected to the arbitral panel's jurisdiction to entertain BG Group's claims, arguing, *inter alia*, that the Investment Treaty authorizes recourse to arbitration "only where disputes have been submitted for 18 months to the competent tribunal of the State which hosts the decision," i.e., a competent tribunal in Argentina. Award ¶ 140. Second, Argentina challenged the arbitral panel's jurisdiction on the grounds that BG Group's claims were derivative in nature, and such claims "are proscribed by international law and by [Argentine] corporate law." *Id.* ¶ 191. Third, Argentina challenged the appointment of Albert Jan van den Berg to the arbitral panel, *id.* ¶ 8, alleging that Jan van den Berg had issued arbitrary and capricious rulings in previous arbitrations involving Argentina, Pet'r's Pet.

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3. Over 25 foreign investors initiated arbitration against Argentina claiming violations of bilateral investment treaties caused by the emergency law's enactment. Resp't's Opp'n at 2.

¶ 75-76. Each of these objections was rejected. Award ¶ 157 (finding that BG Group's claims were arbitrable); *id.* ¶ 205 (concluding that the arbitral panel "has jurisdiction to hear BG[Group's] claims as they relate to its indirect shareholding in MetroGAS"); *id.* ¶ 11 (noting that the International Chamber of Commerce International Court of Arbitration (the "ICC Court") "had decided to reject [Argentina's] challenge [to] Professor Albert Jan van den Berg" to the arbitral panel).[4] Both parties then proceeded with the arbitration, and, on December 24, 2007, the arbitral panel unanimously ruled in favor of BG Group and issued an award in the amount of $185,285,485.85 plus costs, attorneys' fees, and interest. Pet'r's Pet. at 3. In its decision, the arbitral panel rejected numerous arguments raised by Argentina, one of which was its reliance on the "state of necessity" doctrine to exonerate it from liability.[5] Award ¶ 391. The arbitral panel then concluded that Argentina breached the Investment Treaty and awarded damages to BG Group based on the fair market value of its investment in MetroGAS. *Id.* ¶ 422.

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4. Under Article 12(1)(b) of the UNCITRAL Rules, which governed the arbitration at issue in this case, a challenge to the seating of an arbitrator on an arbitral panel must be brought before an "appointing authority" that has been previously designated by the parties. In this case, the ICC Court had been designated as the "appointing authority" by the parties. Award ¶ 9.

5. Argentina argued that it could invoke the "state of necessity" doctrine because it was purportedly "compelled to depart from [its] obligations with [the United Kingdom] in order to preserve an essential state interest in a situation of grave or imminent danger." Award ¶ 391.

Clearly unsatisfied with the outcome of the arbitration decision, Argentina filed its petition to vacate or modify the Award on March 21, 2008. In support of its prayer for relief, Argentina asserts the following arguments: (1) "[t]he [a]rbitrators exceeded their authority by disregarding [the] terms of [the] parties' agreement," Pet'r's Pet. ¶ 41; (2) "[t]he [a]rbitral [t]ribunal misunderstood applicable law . . . and failed to correctly apply [such law]," *id.* ¶ 61; (3) "[t]he International Court of Arbitration exceeded its authority by failing to disqualify [Jan van den] Berg from serving as [an] arbitrator," *id.* ¶ 69; (4) the award was procured by "corruption, fraud, or undue means," *id.* ¶¶ 79-80; and (5) the arbitral tribunal imposed a disproportionate and unfair award, *id.* ¶ 107. BG Group, in turn, argues that Argentina's claims are "without merit and must be dismissed." Resp't's Cross-Mot. at 16.[6] BG Group also moves to have the Award confirmed pursuant to 9 U.S.C. § 9 and Article IV of the New York Convention. *Id.* at 36.

II. Standard of Review

The Court's authority to vacate an arbitral award is governed by 9 U.S.C. § 10(a), which provides the following:

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6. BG Group also seeks an order from the Court requiring Argentina to post a pre-judgment bond before having its petition considered by the Court. On March 31, 2010, the Court issued an order requiring Argentina to post a pre-judgment bond. Upon further reflection, however, the Court concludes that the posting of a bond is unnecessary, in light of the Court's conclusion here that Argentina's petition to vacate or modify the Award is entirely without merit. Accordingly, the March 31, 2010 Order is vacated, and BG Group's cross-motion for a pre-judgment bond is denied as moot.

Appendix C

In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration-

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Additionally, the Court may modify or correct an arbitral award if (1) the movant can demonstrate that there "was an evident material miscalculation of figures[,] or an evident material mistake in the description of any person, thing, or property referred to in the award," (2) the arbitrator has rendered a decision "upon a matter not submitted to [him], unless it is a matter not affecting the merits of the

decision upon the matter submitted," or (3) "the award is imperfect in matter of form not affecting the merits of the controversy." 9 U.S.C. § 11. The Supreme Court has held that the grounds enumerated in Sections 10(a) and 11 of the FAA are the exclusive means for vacating, modifying, or correcting an arbitral award.[7] *Hall St. Assoc., LLC v.*

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7. In addition to Sections 10(a) and 11 of the FAA, Argentina relies on the non-statutory ground that an arbitral award may be vacated where the award was issued in "manifest disregard of the law." *Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 481 F.3d 813, 816 (D.C. Cir. 2007). A question remains, however, as to whether this basis for vacating an arbitral award survived the Supreme Court's recent decision in *Hall Street Associates LLC v Mattel, Inc.*, 552 U.S. 576 (2008). There, the Supreme Court concluded that Sections 10(a) and 11 of the FAA "provide the . . . *exclusive* grounds for expedited vacatur and modification," 552 U.S. at 584 (emphasis added), but acknowledged that its "vague phrasing" of the "manifest disregard of the law" standard in prior precedents has caused confusion amongst the various circuit courts of appeals, with some circuits viewing that standard as being encompassed within the grounds explicitly listed under the FAA (specifically Sections 10(a)(3) and (4)), *id.* at 585, while others, including the District of Columbia Circuit, have viewed the standard as independent of the grounds explicitly enumerated under Section 10(a), *see Lessin*, 481 F.3d at 816 ("In addition to the grounds under the [FAA] . . . on which an arbitration award may be vacated, an award may be vacated only if it is 'in manifest disregard of the law.'"). The Supreme Court remained silent, however, as to which approach is correct, and neither the Supreme Court nor the District of Columbia Circuit have yet to weigh in on whether *Hall Street Associates* affects any of their respective precedents. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, __ U.S. __, __, __ S. Ct. __, __ , 2010 WL 1655826, at *7 n.3 (Apr. 27, 2010) (declining to decide whether the "manifest disregard of the law" standard survived *Hall Street Associates*); *Regnery*

Mattel, Inc., 552 U.S. 576, 581 (2008).

In relying on these standards to determine whether vacatur or modification of the Award is warranted, the Court must remain mindful of the principle that "judicial review of arbitral awards is extremely limited," and that this Court "do[es] not sit to hear claims of factual or legal error by an arbitrator" in the same manner that an appeals court would review the decision of a lower court. *Teamsters Local Union No. 61 v. United Parcel Serv., Inc.*, 272 F.3d 600, 604 (D.C. Cir. 2001) (quoting *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175, 1178 (D.C. Cir. 1991)). In fact, careful scrutiny of an arbitrator's decision would frustrate the FAA's "emphatic federal policy in favor of arbitral dispute resolution," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (internal citation omitted)—a policy that "applies with special force in the field of international commerce," *id.*—by "undermining the goals of arbitration, namely, settling disputes efficiently and avoiding lengthy and expensive litigation," *LaPrade v. Kidder, Peabody & Co.*, 94 F. Supp. 2d 2, 4-5 (D.D.C. 2000) (Sullivan, J.), *aff'd* 246 F.3d 702 (D.C. Cir. 2001). Instead, "a court must confirm an arbitration award where some colorable support for

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Pub., Inc. v. Miniter, No. 09-7039, 2010 WL 1169843, at *1 (D.C. Cir. Mar. 17, 2010) (assuming, without deciding, that the "manifest disregard of the law" standard survived *Hall Street Associates*). Regardless, the Court need not conclusively determine whether precedent regarding the "manifest disregard of the law" standard has continued viability in light of *Hall Street Associates*, for Argentina's claims nonetheless fail under that standard for the reasons discussed below.

the award can be gleaned from the record." *Id.* Thus, "[t]he showing required to avoid summary confirmation of an arbitration award is high, and a party moving to vacate the award has the burden of proof." *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997) (citations omitted).

III. Legal Analysis

Before addressing the merits of the Petition, the Court must first assess whether it has subject-matter jurisdiction under the FAA to entertain this dispute. In the Petition, Argentina cites 9 U.S.C. § 203 as the basis for the Court's jurisdiction over this matter, *see* Pet'r's Pet. at 2 ("This court has jurisdiction over . . . this Petition pursuant to 9 U.S.C. §§ 201 et seq."), which confers jurisdiction on this Court to entertain "action[s] or proceeding[s] falling under the [New York] Convention," 9 U.S.C. § 203 (2006). Although Argentina seemingly took the position in its jurisdictional statement that the Award falls within the ambit of the New York Convention, it has actually taken the opposite position in this litigation with regards to whether the Court has the authority to grant BG Group's cross-motion for a pre-judgment bond pursuant to Article VI of the New York Convention. *See, e.g.*, Pet'r's 2d Supp. Mem. at 2. The Court suspects that Argentina merely intended to argue against the applicability of the Convention for the sole purpose of defeating BG Group's efforts at securing a pre-judgment bond, but in so doing, Argentina has also potentially undermined its own invocation of this Court's subject-matter jurisdiction. This is because without recourse to Section 203, the Court is likely without any

other basis to find that it has subject-matter jurisdiction, as the FAA does "not itself bestow[] jurisdiction on the federal district courts" under 28 U.S.C. § 1331, *Karsner v. Lothian*, 532 F.3d 876, 882 (D.C. Cir. 2008) (quoting *Kasap v. Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1245-46 (D.C. Cir. 1999)), jurisdiction is not available under 28 U.S.C. § 1332 because diversity jurisdiction is not available where "a lawsuit [is] brought by one alien against another alien, without a citizen of a state on either side of the litigation," *see, e.g.*, *Saadeh v. Farouki*, 107 F.3d 52, 58 (D.C. Cir. 1997); *see also* Pet'r's Pet. ¶¶1-2 (noting that the petitioner is the Argentinean government, while the respondent is a British corporation), and there is no other independent ground for federal court jurisdiction that the Court is aware of that would allow it to entertain this matter. Given that Argentina has called into question the applicability of the New York Convention, and that the resolution of this issue may have a material effect on the Court's jurisdiction, the Court has no choice but to first resolve the issue of whether the exercise of jurisdiction over this matter is proper under Section 203 before addressing the merits of Argentina's petition and BG Group's cross-motion. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977) (concluding that all courts "are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction"); *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-31 (2007) (citing *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 93-102 (1998)) ("[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of a claim in suit . . . .").

Appendix C

A. The Jurisdiction of the Court to Entertain the Petition and Cross-Motion

As noted above, whether the Court has subject-matter jurisdiction over this dispute hinges on whether the Award is one that is covered under the New York Convention. Article I(1) of the New York Convention provides the following:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

New York Convention, art. I(1). Put differently, the first sentence applies to arbitral awards that are issued outside the territorial boundaries of the nation where enforcement is being sought, while the second sentence refers to awards that are issued within the borders of the nation where enforcement is sought, yet are sufficiently foreign in character as to not be considered "domestic awards" in that country.[8] The parties agree that the Award was

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8. For ease of reference, the Court will refer to the first provision of Article I(1) as the "extraterritorial" provision, and the second provision as the "non-domestic" provision.

issued in the District of Columbia and it therefore falls outside the bounds of the "extraterritorial" provision of Article I(1). *See Bergensen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983) (concluding that an arbitral award issued in New York "does not meet the territorial criterion"). The parties do not agree, however, whether the United States recognizes the "non-domestic" provision at all, and even if it does, whether this Award falls within the meaning of a "non-domestic" award under Article I(1) of the New York Convention.

In support of its argument that the United States does not recognize the "non-domestic" provision of the New York Convention, Argentina relies on the United States's invocation of a reservation contained in Article I(3) of the Convention, Pet'r's 2d Supp. Mem. at 2, which was aptly described by one of the Convention's drafters as the "reciprocity clause," *see, e.g.*, United Nations Conference on International Commercial Arbitration, May 20-June 10, 1958, *Adoption and Signature of the Final Act and Convention*, at 9, U.N. Doc. E/CONF.26/SR.23 – E/CONF.26/L.60 (June 9, 1958). The clause maintains, in part, that "[t]he United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State."[9] New York

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9. Article I(3) of the New York Convention states the following:

> When signing, ratifying[,] or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity

Convention, Note by the Department of State, 21 U.S.T. 2517, 330 U.N.T.S. 38, *available at* 1970 WL 104417, at *1. Argentina argues that a plain reading of this declaration compels "a district court to recognize and enforce only . . . arbitral award[s] rendered in a foreign state." Pet'r's 2d Supp. Mem. at 4.

Argentina's reading of the reservation fails to comport with the well-known canon of statutory construction that a court must "give effect, if possible, to every word . . . used," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), because its interpretation renders superfluous the phrase "on the basis of reciprocity" as it is used in the declaration. Indeed, Argentina's proffered interpretation of the "reciprocity clause" has nothing to do with the concept of reciprocity whatsoever. By taking into account the reciprocity language, it is evident that Article I(1) of the New York Convention is not concerned with the applicability of the "non-domestic" provision, but rather, as noted by BG Group, the clause addresses "the inapplicability of the New York Convention to [arbitral] awards rendered in States that are not a party to the . . . Convention." Resp't's 2d Supp. Mem. at 2-3. It is BG Group's interpretation of Article I(1), not Argentina's, that accounts for each and every word comprising the "reciprocity clause."

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declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Another defect present in Argentina's interpretation of the "reciprocity clause" is that it directly conflicts with Congress's understanding of the New York Convention's extensive reach to arbitral awards issued in the United States, as reflected in the language of 9 U.S.C. § 202 (2006), which provides that:

> [a]n agreement or award arising out of [a commercial] relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

While it is clear that arbitral awards "between citizens of the United States" that maintain "some . . . reasonable relation[ship] with one or more foreign states" are covered by the New York Convention pursuant to Section 202, Congress did not explicitly state whether Section 202 applies to arbitral awards rendered abroad, awards issued domestically, or both. But in reading Section 202 *in pari materia* with the New York Convention, it is evident that Congress did not intend for this provision to relate to arbitral awards issued outside of the territorial jurisdiction of the United States, as an award rendered under that circumstance falls within the explicit language of the "extraterritorial" provision of Article I(1) of the Convention. *See* New York Convention, art. I(1); Albert Jan van den Berg, *When Is an Arbitral Award Nondomestic Under the New York Convention of 1958*, 6 Pace L.

Rev. 25, 39 (1985) ("[T]he New York Convention always applies to the recognition and enforcement of an arbitral award made in another state."). Thus, Congress must have intended for Section 202, and the provisions of the New York Convention, to apply to arbitral awards issued within the territorial boundaries of the United States, i.e., awards covered under the "non-domestic" provision of the Convention. Accordingly, Section 202 debunks any argument that Congress, in ratifying the New York Convention, understood the "reciprocity clause" to limit the reach of that treaty to only those arbitral awards issued extraterritorially.

As for whether the Award constitutes a "non-domestic" award under the New York Convention, the starting point in resolving that question is the Convention itself. As the plain text of Article I(1) states, each individual signatory to the Convention determines what constitutes a "non-domestic" award. *See* New York Convention, art. I(1) (applying the Convention to "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought"). And, as noted above, Congress intended to "spell[] out its definition of" a "non-domestic" award in Section 202 of the FAA, and that in doing so, it did not exclude from its definition arbitral awards involving two foreign parties. *Bergensen*, 710 F.2d at 933. In fact, Section 202 extends the coverage of the New York Convention to arbitral awards "between citizens of the United States" that maintain some "reasonable relation[ship] with one or more foreign states." 9 U.S.C. § 202. Given that Congress plainly intended for the New York Convention to cover certain arbitral awards issued

in matters involving two *domestic* parties, it would be nonsensical for this Court to conclude that the Award—which was issued in a dispute involving two *foreign* parties, a *foreign* treaty, and a *foreign* investment—falls outside the reach of a treaty that was ratified for the purpose of recognizing and enforcing *foreign* arbitral awards. Therefore, the Award plainly falls within the "non-domestic" provision of Article I(1) of the New York Convention and, consequently, this Court has subject-matter jurisdiction to entertain this matter under 9 U.S.C. § 203.[10]

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10. BG Group contends that the Court should not entertain the Petition because Argentina failed to comply with 9 U.S.C. § 12, which requires a party moving to vacate, modify, or correct an arbitral award to serve "[n]otice of [the] motion . . . upon the adverse party or his attorney within three months after the award is filed or delivered." Specifically, BG Group alleges that the Award was delivered to the parties on December 24, 2007, and that Argentina did not serve notice of the Petition until April 8, 2008, approximately two weeks after the limitations period expired on March 24, 2008. Resp't's Cross-Mot. at 14. On the other hand, Argentina asserts that it had sent an e-mail, with the Petition attached, to both BG Group and its counsel on March 20, 2008. Pet'r's Reply at 5; *see also* Pet'r's Pet., Ex. 3 (Affidavit of Fernando Koatz) ¶ 6-7 (declaring under oath that the Petition was served on BG Group and its counsel on March 20, 2008).

While Section 12 of the FAA is unquestionably applicable to the Petition now before the Court, *see* 9 U.S.C. § 208 (providing that 9 U.S.C. §§ 1-12 are applicable to matters covered under the New York Convention "to the extent that [they] are not in conflict with [9 U.S.C. §§ 201-208] or the Convention as ratified by the United States"), the problem with construing Section 12 in the context of international arbitration awards is that this provision "is an

anachronism [that does not] account for the internationalization of arbitration law subsequent to its enactment." *Matter of Arbitration Between InterCarbon Bermuda, Ltd. and Caltex Trading and Transp. Corp.*, 146 F.R.D. 64, 67 n.3 (S.D.N.Y. 1993). This is because Section 12 prescribes the appropriate manner of service for parties located in a district within the United States, but does not "give any direction for service on a foreign party." *Id.* at 67. Further complicating the analysis is that the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (the "Hague Convention"), Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163, presumably governs the method for serving process on an adverse party abroad, at least in the absence of any mandate to the contrary. But under the Hague Convention, a petitioner's compliance with Section 12 of the FAA would be virtually impossible because the Convention requires that a "central authority" located within the receiving country be solely responsible for serving the documents within that country, *id.* art. 5, and these "central authorities can and do take significantly longer than 90 days to arrange for service of process," *Broad v. Mannesmann Anlagenbau AG*, 196 F.3d 1075, 1077 (9th Cir. 1999). And because various courts have observed that "[t]here is no statutory or common law exception to" the three-month time limitation set forth under Section 12, strict enforcement of the limitations period set forth under Section 12 would effectively bar any petition to vacate an arbitral award where foreign parties stand on both sides of the aisle. *Dalal v. Goldman Sachs & Co.*, 541 F. Supp. 2d 72, 76 (D.D.C. 2008) (Sullivan, J.), aff'd 575 F.3d 725 (D.C. Cir. 2009); *see also Webster v. A.T. Kearney, Inc.*, 507 F.3d 568, 574 (7th Cir. 2007) (denying the petition to vacate because it was filed one day late); *Sanders- Midwest, Inc. v. Midwest Pipe Fabricators, Inc.*, 857 F.2d 1235, 1238 (8th Cir. 1988) (finding no exceptions to the time for service of notice as prescribed under Section 12).

Fortunately for the Court, the quandary of applying Section 12 in the international arbitration context is a perplexing problem

B. The Merits of the Petition and Cross-Motion

Turning to the merits of the Petition, Argentina relies on several provisions under 9 U.S.C. §§ 10(a) and 11 in support of its request for vacatur or modification of the Award. Specifically, Argentina argues that the Award should be vacated for the following reasons: (1) the arbitral panel exceeded its authority under the Investment Treaty, 9 U.S.C. § 10(a)(4); (2) the arbitral panel acted "in manifest disregard of the law," *LaPrade*, 246 F.3d at 706 (citation omitted); (3) there was "evident partiality or corruption" on the part of one of the arbitrators on the panel, 9 U.S.C. § 10(a)(2); (4) the Award was procured through "corruption, fraud, or undue means," 9 U.S.C. § 10(a)(1); and (5) the Award is disproportionate, unfair, and irrational, and therefore should be modified pursuant to 9 U.S.C. § 11. The Court will address each issue in turn.

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whose resolution will be left for another day, as this issue does not involve a question of jurisdiction, *Dalal*, 541 F. Supp. 2d at 76 (construing the three-month time limitation under Section 12 as a statute of limitations, rather than a jurisdictional bar), that the Court must resolve first before addressing the merits, *Sinochem*, 549 U.S. at 430-31 (citing *Steel Co.*, 523 U.S. at 93-102). Furthermore, the Court need not resolve this issue because even assuming that Argentina timely served notice of the Petition, the Court nonetheless concludes that the Petition is without merit. The Court will, therefore, pass on the question of whether Argentina is time-barred under Section 12 from asserting the claims at issue here.

Appendix C

1. Whether the Arbitral Panel and ICC Court Exceeded Their Authority

Argentina proffers several arguments in support of its position that the Court should vacate the Award pursuant to Section 10(a)(4) of the FAA. First, Argentina contends that the ICC Court exceeded its authority by failing to disqualify Jan van den Berg from serving on the panel. Pet'r's Pet. ¶ 69. Second, Argentina asserts that the Court must vacate the Award under Section 10(a)(4) because the arbitral panel improperly "permit[ed] BG [Group] to arbitrate its claims" before seeking recourse in the Argentine courts. *Id.* ¶ 60. Third, Argentina contends that the arbitral panel acted outside the bounds of its authority by allowing BG Group to "bring[] a derivative claim on behalf of MetroGAS." *Id.* And fourth, Argentina argues that the arbitral panel wrongfully rejected "the discounted cash flow method" in calculating the amount of the Award. *Id.* ¶ 105.

In order for Argentina to prevail in its efforts to vacate the Award under Section 10(a)(4), it must demonstrate that the "arbitrator stray[ed] from interpretation and application of the agreement and effectively dispense[d] his own brand of industrial justice." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, __ U.S. __, __, __ S. Ct. __, __, 2010 WL 1655826, at *7 (Apr. 27, 2010) (citations and internal quotation marks omitted). But, "if an arbitrator was arguably construing or applying the contract, a court must defer to the arbitrator's judgment." *Madison Hotel v. Hotel & Rest. Employees, Local 25*, 144 F.3d 855, 859 (D.C. Cir. 1998) (citation and internal quotation marks

omitted). In conducting its review, the Court "may review the substance of an arbitration award, [but] only the narrowest circumstances will justify setting the award aside." *Id.* at 858-59 Applying these standards here, it is evident that Argentina has failed demonstrate that vacatur is appropriate under Section 10(a)(4).

On the question of whether the ICC Court exceeded its authority by failing to unseat Jan van den Berg from the arbitral panel, the claim is without merit. Nowhere in its Petition does Argentina dispute the ICC Court's authority under the Investment Treaty or the UNICTRAL arbitration rules to entertain its objection to Jan van den Berg's appointment to the arbitral panel. And, to the extent that Argentina argues that the ICC Court exceeded its authority by allowing a partial and biased arbiter to sit on the panel, that argument must be rejected because Argentina has failed to provide any evidence establishing partiality on the part of Jan van den Berg. *See infra* p. 20-21. Argentina has simply provided no basis from which the Court could vacate the Award based on the ICC Court's exercise of authority.

Likewise, Argentina has not met its burden of showing that the arbitral panel exceeded its authority by entertaining BG Group's claims without requiring that recourse first be sought in the Argentine court system. The panel concluded that BG Group need not seek recourse in the Argentine court system before arbitrating this dispute because "[a]s a matter of treaty interpretation, . . . Article 8(2)(a)(i) cannot be construed as an absolute impediment to arbitration" where "any such interpretation

would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention [on the Law of Treaties]."[11] Award ¶ 147. And, the arbitral panel concluded that a strict textual interpretation of Article 8(2)(a)(i) would result in an "absurd and unreasonable result" because Argentina had promulgated "emergency legislation . . . whose purpose was to bar recourse to the courts by those whose rights were felt to be violated." *Id.* ¶ 148; *see also id.* ¶ 149 (concluding that Argentina had also implemented a decree which "provided for a stay of all suits brought by those whose rights were allegedly affected by the [government's] emergency measures"). As the cited language illustrates, the panel correctly turned to the text of Article 8(2)(a)(i) of the Investment Treaty and relevant international law sources in attempting to discern its jurisdiction to hear BG Group's claims, and it relied upon a colorable, if not reasonable, interpretation of these provisions in concluding that the matter was arbitrable. Under Section 10(a)(4) and controlling case law, the Court is without authority to disturb the panel's conclusions.

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11. Article 32 of the Vienna Convention on the Law of Treaties, to which Argentina is a signatory, provides that "[r]ecourse may be had to supplementary means of interpretation" when standard means of treaty interpretation would "leave[] the meaning [of the provision] ambiguous or obscure[,] or . . . lead[] to a result which is manifestly absurd or unreasonable." The arbitral panel was authorized, if not compelled, to resort to sources of international law in construing Article 8(2)(a)(i) of the Investment Treaty. *See* Investment Treaty, art. 8(4) (requiring "[t]he arbitral tribunal [to] decide the dispute in accordance with the provisions of [the Investment Treaty] and the applicable principles of international law").

Appendix C

Argentina's remaining efforts to vacate the Award under Section 10(a)(4) must also be rejected. In determining whether international law authorized BG Group to bring "a derivative claim on behalf of MetroGAS," Pet'r's Pet. ¶ 60, the panel reviewed several arbitration decisions and ultimately concluded that those cases supported the proposition that derivative claims are allowable under international law. In fact, the two cases cited by Argentina to support its argument that the panel could not hear derivative claims were actually found by the arbitral panel to stand for the opposite proposition. *See* Award ¶ 192 ("In support for its position [that derivative claims are not allowable] under international law, [Argentina] initially relied on *Barcelona Traction, Light and Power Co. [(Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5)], and it later invoked . . . [*GAMI Investments, Inc. v. United Mexican States*, UNCITRAL/NAFTA, Final Award (Nov. 15, 2004)]"), *id.* ¶ 197 (concluding that international law "does not require a claimant shareholder to be a majority or controlling owner for his investment to qualify for protection"); *id.* ¶ 193 ("The Tribunal finds the *GAMI* decision apposite and compelling as it relates generally to derivative claims, and specifically to the significance of *Barcelona Traction*."). Similarly, when the panel concluded that Section 2.2 of the Investment Treaty was silent on the standard for calculating damages, the arbitral panel properly turned to sources of international law to "identify the rule of law that governs in that situation." *Stolt-Nielsen S.A.*, __ U.S. at __, __ S. Ct. at __, 2010 WL 1655826, at *7; *see also* Award ¶ 423-24 (relying "on the principle established in 1928 by the Permanent Court of International Justice in the *Case Concerning the Factory at Charzów [(F.R.G. v.*

Pol.), 1928 P.C.I.J. (ser. A) No. 17, at ¶ 330 (Sept. 13)]" that "reparation is due for failure to apply a convention even where the convention itself is silent on the issue"); *id.* ¶ 428 (construing customary international law to require that the wrongful act be the proximate cause of the damages, and that the damages must not be speculative in nature). And, the panel determined that under customary international law, BG Group was entitled to the difference in value of BG's investment before the enactment of Argentina's emergency laws and the value of the investment after the legislation was adopted. *Id.* ¶ 440 (referring to BG Group's relinquishment of "an 18.8% indirect interest in MetroGAS in exchange for a US$38.2 million write-off," resulting "in a post-Emergency Law value of BG's 45.11% interest in MetroGAS of US$91,825,244.15"); *id.* ¶ 441 (relying on BG Group's expert witness in determining that the company's share in MetroGAS prior to the enactment of the emergency laws was US$277.0 million); *id.* ¶ 443 (concluding that BG Group is entitled to approximately US$185 million in damages). Whether the arbitral panel's reached the correct result in resolving these issues is not a matter fit for resolution by the Court; rather, it is merely enough that the arbitral panel reached conclusions that could arguably be justified by a colorable construction of the Investment Treaty's provisions and any applicable concepts derived from international law. And here, the Court is satisfied that the panel's conclusions meet that threshold. The arbitral panel having provided sustainable constructions of the Investment Treaty, the Court must rebuff Argentina's efforts to vacate the Award under Section 10(a)(4).

2. Whether the Arbitral Panel Acted In Manifest Disregard of the Law

To prevail under the "manifest disregard of the law" standard, Argentina must demonstrate "more than error or misunderstanding with respect to the law." *LaPrade*, 246 F.3d at 706. Rather, it must show that "(1) the arbitrators knew of a governing legal principle[,] yet refused to apply it or ignored it altogether[,] and (2) the law ignored by the arbitrators was well[-]defined, explicit, and clearly applicable to the case." *Id.* Here, Argentina argues that the arbitral panel's exercise of jurisdiction over BG Group's claims, as well as the panel's rejection of the "state of necessity" doctrine relied upon by Argentina in the arbitration, were made in "manifest disregard of the law." Pet'r's Reply at 10, 12. These arguments are simply without merit.

In resolving the jurisdictional question, the arbitral panel did not "*ignore[]* the plain language of the [Investment] Treaty," as Argentina suggests. Pet'r's Reply at 10 (emphasis added). Rather, as noted above, the arbitral panel *construed* Article 8(2)(a)(i) of the Investment Treaty together with Article 32 of the Vienna Convention and determined that the former was not applicable under the particular circumstances of this case. Given that the arbitral panel provided a colorable justification for its interpretation of the Investment Treaty, it can hardly be said that the panel *disregarded* the applicable law.

Similarly, Argentina's argument that the arbitral panel "misunderstood . . . and failed to correctly apply

the ['state of necessity'] doctrine" is nothing more than a mere assertion of error, and not that the panel manifestly disregarded the law. Pet'r's Pet. ¶ 61. Indeed, Argentina even admits that the panel addressed the "state of necessity" doctrine in issuing the Award. *See id.* ¶ 64 (contending that "[i]n a mere[] short seven paragraphs of the Award . . . the [panel] arbitrarily dismissed [the ']state of necessity[']] defense"). But putting aside the fact that the arbitral panel considered, rather than ignored, Argentina's invocation of the "state of necessity" doctrine, it is far from certain that the doctrine is "clearly applicable" in this case. As the arbitral panel explained in issuing the Award, a country cannot invoke the "state of necessity" doctrine without being subject to "very restrictive conditions" to ensure that the country does not abuse the doctrine and "violate . . . international law with impunity." Award ¶ 410; *see also International Court of Justice, Case Concerning The Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, 1997 I.C.J. 7 (Sept. 25) (concluding that the "state of necessity" doctrine, as codified in Article 25 of the International Law Commission's Articles on State Responsibility, is limited to circumstances in which there is "grave and imminent peril"). And, the panel found that Argentina could not invoke this doctrine because, *inter alia*, it had lured BG Group and other investors to accept measures that Argentina described as temporary, but later "set[] up a mechanism . . . that was never intended to restore the conditions of Argentina's initial representations." Award ¶ 411. Thus, the "state of necessity" doctrine is by no means "clearly applicable" to this case; if anything, the arbitral panel explained why this doctrine has no application to the

facts of this case whatsoever. The Court, therefore, rejects Argentina's challenges to the arbitral panel's decision based on the "manifest disregard of the law" standard.

3. Whether There was Evident Partiality or Corruption With the Arbitrators

To have the award vacated under Section 10(a)(2), Argentina must present evidence of partiality or corruption that is "direct, definite, and capable of demonstration[,] rather than remote, uncertain, or speculative." *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 683 (D.C. Cir. 1996) (citation omitted). Indeed, Argentina has the "heavy" burden to "establish *specific* facts that indicate improper motives on the part of an arbitrator." *Id.* (emphasis added and citation omitted). As grounds for its position, Argentina contends that arbitrator Albert Jan van den Berg presided over four arbitral matters arising out of the Investment Treaty, and that in the first matter (involving a company named LG&E), he held that Argentina could rely on the "state of necessity" doctrine, while in the three other arbitrations (including the one now being disputed before the Court), Jan van den Berg concluded, without elaboration, that the doctrine could not be invoked. Pet'r's Pet. ¶ 71. Argentina argues that Jan van den Berg's inconsistent decisions, as well as his failure to explain the reasoning behind his decisions, is evidence of bias and that the Award must be vacated for those reasons. *Id.* ¶ 76. The argument lacks merit.

Jan van den Berg's failure to provide an explanation for his decision is hardly evidence of nefarious intent on

his part, especially given the well-settled principle that arbitrators have no obligation to disclose the basis upon which their awards are made. *Wilko v. Swan*, 346 U.S. 427, 436 (1953). Furthermore, there could be a number of innocuous reasons to explain why Jan van den Berg reached a different conclusion in the first case. For example, there may be a material factual distinction between this case and the *LG&E* case. *See, e.g.*, Resp't's Reply at 2 n.3 (asserting that the *LG&E* tribunal accepted Argentina's defense of necessity based on a provision which is contained in the bilateral investment treaty between the United States and Argentina, but does not exist in the Investment Treaty at issue here). Or, it may be that LG&E failed to articulate a persuasive argument in opposition to Argentina's invocation of the state of necessity doctrine, while BG Group and the other litigants have since raised convincing challenges. The upshot is that there is no basis for the Court to conclude that Jan van den Berg was a biased arbiter without engaging in rank speculation. Accordingly, Argentina has failed to provide the Court with "direct" and "definite" evidence of arbiter bias which is necessary to prevail under Section 10(a)(2) of the FAA. *Al-Harbi*, 85 F.3d at 683.

4. Whether the Award was Procured by Corrupt, Fraudulent, or Undue Means

Argentina asserts that the Award was procured by "corrupt, fraud, or undue means" because witness statements presented in this case contain "passages that are identical or substantially identical to a witness statement presented in [another unrelated] case." Pet'r's

Pet. ¶ 82. Specifically, Argentina observes that the "witness statements presented in this case have many passages that are identical or substantially identical to a witness statement presented in [an earlier] case," and that because counsel for BG Group represented the plaintiff involved in the earlier case, the statements must "reflect what [c]ounsel would have [the] witness[es] declare," rather than "what the witness[es] saw, thought[,] or believed at the time" the statements were made. *Id.* ¶ 82.

But Argentina assumes too much. At best, the similarities between the witness statements establish that counsel drafted the declarations in both cases. Assuming that counsel did in fact have a heavy hand in drafting the declarations at issue in these cases, their actions do not rise to the level of wrongdoing unless Argentina can prove that the witness signed the statement without subscribing to the facts stated therein. *See Resolution Trust Corp. v. Bright*, 6 F.3d 336, 342 (5th Cir. 1993) (finding no ethics violation where attorneys drafted an affidavit but "made sure that [the witness] signed [it] only if she agreed with its contents"). Argentina has provided no evidence to that effect, and thus there is nothing in the record before the Court that allows for vacatur of the Award pursuant to Section 10(a)(1).

5. Whether a "Disproportionate," "Unfair," and "Irrational" Award Can Be Modified Under 9 U.S.C. § 11

Finally, Argentina argues that the Court should modify the Award because the arbitral panel's rejection

of the "discounted cash flow basis" standard resulted in a disproportionate, unfair, and irrational Award. Pet'r's Reply at 17. Unfortunately for Argentina, Section 11 of the FAA does not authorize the Court to modify the Award on these grounds. Rather, the Court can modify the Award under Section 11 only if it finds that the Award contains a "material miscalculation of figures," 9 U.S.C. § 11(a), i.e., a "mathematical error appear[ing] on [its] face," *Grain v. Trinity Health, Mercy Health Servs., Inc.*, 551 F.3d 374, 378 (6th Cir. 2008) (quoting *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 194 (4th Cir. 1998)), the arbitrators had decided a matter that was "not submitted to them," 9 U.S.C. § 11(b), or that the Award "is imperfect in matter of form not affecting the merits of the controversy," *id.* § 11(c). Argentina does not rely on any of these as grounds for modifying the Award under Section 11 and therefore relief under this provision is not available to it. The request for such relief must therefore be denied.

IV. Conclusion

"A federal court cannot vacate [or modify] an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law." *Howard Univ. v. Metro. Campus Police Officer's Union*, 519 F. Supp. 2d 27, 37 (D.D.C. 2007) (Walton, J.) (quoting *Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004)). Yet Argentina's attack on the validity of the Award is premised on nothing more than numerous assertions of error on the part of the arbitral panel. To be sure, under a more searching, appellate-style review, the arguments presented by Argentina in its

Petition could very well carry the day. But, because the Court in this circumstance does not sit like "an appellate court does in reviewing the decisions of lower courts," *Kanuth*, 949 F.2d at 1178, the Court has no choice but to deny the relief sought by Argentina in its Petition.

The remaining question in this matter, therefore, is whether the Court should grant BG Group's cross-motion to confirm the Award. Argentina argues that it "should be given [a] full opportunity to respond to [BG Group's cross-motion] once the Court has [rendered] a decision" regarding its Petition, "considering the serious violations of public policy" allegedly committed by the arbitral pan[illegible],[12] Pet'r's Reply at 22, while BG Group responds that Argentina has had more than a month to oppose the cross-motion, but that in any event, "Argentina's challenge to the Award on public policy grounds is entirely without foundation," Resp't's Reply at 4 n.4. The Court shares a level of empathy with BG Group's position (i.e., that Argentina could have (and should have) set forth in its memorandum in opposition to BG Group's cross-motion the basis for vacatur on public policy grounds), and that given the nature of the Award, the Court is highly skeptical that the Award violates this country's "most basic notions of morality and justice." *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 939 (D.C. Cir. 2007) (quoting *Karahas Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 305-06 (5th Cir. 2004)).

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12. Article V(2)(b) of the New York Convention provides a court with the authority to refuse recognition of an arbitral award if confirmation of the award "would be contrary to the public policy of that country."

Nonetheless, in light of Argentina's express reservation for further briefing on the issue of whether vacatur is appropriate under Article V(2)(b) of the New York Convention, the Court concludes that Argentina should be given the opportunity to submit a supplemental memorandum. Thus, any supplemental memorandum that Argentina desires to submit on this issue shall be filed on or before June 30, 2010, BG Group shall file its memorandum in opposition to Argentina's supplemental memorandum on or before July 21, 2010, and Argentina shall file its brief in reply to BG Group's opposition memorandum on July 30, 2010. And, to ensure the prompt resolution of this matter, the parties shall then appear before the Court at 9:30 a.m. on August 13, 2010, for a hearing on the merits of BG Group's motion to confirm the Award. The Court expects strict adherence to this schedule, given the inconvenience and additional delay that BG Group will have to endure as a result of additional briefing. Accordingly, the Court will not grant Argentina any extensions of time to file its submissions absent the most compelling circumstances, and the failure of Argentina to timely file a supplemental memorandum will result in the Court treating BG Group's cross-motion as conceded.

Appendix C

SO ORDERED on this 7th day of June, 2010.[13]

REGGIE B. WALTON
United States District Judge

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13. The Court issued an order on March 31, 2010, granting BG Group's motion for a pre-judgment bond and, *inter alia*, staying further action in this case until otherwise ordered by the Court. In light of the foregoing analysis, the Court will issue an order accompanying this memorandum opinion (1) vacating the March 31, 2010 order; (2) lifting the stay and administratively reopening the case; (3) denying Argentina's Petition to Vacate or Modify an Award; (4) denying as moot BG Group's Motion for a Pre-Judgment Bond; (5) directing Argentina to file a supplemental memorandum explaining its reasons why the Court should refrain from confirming the Award pursuant to Article V(1)(c) of the New York Convention, if any it intends to file, on or before June 30, 2010; (6) directing BG Group to file its memorandum in opposition to Argentina's supplemental memorandum, if any it intends to file, on or before July 21, 2010; (7) directing Argentina to file its brief in reply to BG Group's opposition memorandum, if any it intends to file, on or before July 30, 2010; and (8) directing the parties to appear before the Court at 9:30 a.m. on August 13, 2010, for a hearing on the merits of BG Group's motion to confirm the Award.

APPENDIX D — ARBITRAL AWARD, DATED DECEMBER 24, 2007

In proceedings pursuant to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, entered into on 11 December 1990 and the UNCITRAL Arbitration Rules:

BG Group Plc.

Claimant

and

The Republic of Argentina

Respondent

Final Award

24 December 2007

Before the Tribunal comprising:
Alejandro M. Garro, Arbitrator
Albert Jan van den Berg, Arbitrator
Guillermo Aguilar Alvarez C., President

Appendix D

Representing the Claimant:	Representing the Respondent:
Freshfields Bruckhaus Deringer	**Procuración del Tesoro de la Nación**
Nigel Blackaby	Osvaldo César Guglielmino
Lluis Paradell	Cintia Yaryura
Sylvia Noury	Jorge Barraguirre
Andrea Saldarriaga	Florencio Travieso
Marval, O'Farrell & Mairal	
Francisco Macías	

Administrative Secretary of the Arbitral Tribunal

Lucía Ojeda

Formal seat of the arbitration: Washington, D.C.

[INDEX INTENTIONALLY OMITTED]

I. The Parties

1. The Claimant in this arbitration is BG Group Plc. (BG), a British corporation located at 100 Thames Valley Park Drive, Reading Berkshire, RG6 1PT, in the United Kingdom. BG has a direct and an indirect ownership interest in MetroGAS S.A. (MetroGAS). MetroGAS is a natural gas distribution company incorporated in Argentina. BG was represented by Nigel Blackaby, Lluis Paradell, Andrea Saldarriaga, and Sylvia Noury of Freshfields Bruckhaus Deringer, and Francisco Macías of Marval, O'Farrell & Mairal.

2. The Respondent in this arbitration is The Republic of Argentina (Argentina), acting through the *Procuración del Tesoro de la Nación*, located at Posadas 1641, Buenos Aires, Argentina. Argentina was represented by Osvaldo César Guglielmino, Cintia Yaryura, Jorge Barraguirre and Florencio Travieso of the *Procuración del Tesoro de la Nación*. At the hearing, however, the following individuals also appeared for Argentina: Adolfo Gustavo Scrinzi (*Subprocurador de la Nación*), Felix Helou, Tomás Braceras, Rodrigo Ruiz-Esquide, Nicolas Stern, Ariel Martins, Ignacio Torterola, Charles Massano, Carlos Winograd, Alicia Federico and Mauricio Longín D'Alessandro.

II. The Tribunal and the Procedure

3. BG filed its Notice of Arbitration of 25 April 2003 pursuant to the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments* of 11 December 1990 (the Argentina-U.K. BIT or the BIT).[1] Article 8 of the Argentina-U.K. BIT provides that:[2]

> (1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled shall be submitted, at the request of one of

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1. Exhibit J-69.

2. Where available, official English text of quotes shall be used.

the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.

(2) The aforementioned disputes shall be submitted to international arbitration in the following cases:

(a) if one of the Parties so requests, in any of the following circumstances:

(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;

(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;

(b) where the Contracting Party and the investor of the other Contracting Party have so agreed.

(3) Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on

the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965 (footnote omitted) (provided that both Contracting Parties are Parties to the said Convention) and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

(b) an international arbitrator or *ad hoc* arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If after a period of three months from written notification of the claim there is no agreement to one of the above alternative procedures, the Parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The Parties to the dispute may agree in writing to modify these Rules.

(4) The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in the dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law. The arbitration decision shall be final and binding on both Parties.

> (5) The provisions of this Article shall not apply where an investor of one Contracting Party is a natural person who has been ordinarily resident in the territory of the other Contracting Party for a period of more than two years before the original investment was made and the original investment was not admitted into that territory from abroad. But, if a dispute should arise between such an investor and the other Contracting Party, the Contracting Parties agree to consult together as soon as possible so that they can reach a mutually acceptable solution.

4. Because the Parties failed to agree on submission of the dispute to the International Centre for the Settlement of Investment Disputes (ICSID), BG submitted to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (the UNCITRAL Rules).

5. The Parties designated arbitrators in accordance with Article 7(1) of the UNCITRAL Rules. BG appointed Professor Albert Jan van den Berg and the Republic of Argentina appointed Professor Alejandro M. Garro. Messrs. van den Berg and Garro designated Guillermo Aguilar Alvarez as President of the Arbitral Tribunal. The Tribunal was constituted on 22 June 2004. The Arbitral Tribunal appointed Mrs. Lucia Ojeda as its Administrative Secretary.

6. On 29 October 2004 a Preliminary Conference was held in New York City to address issues related with the conduct of the proceedings.

7. The Tribunal sees no need to burden the text of this Award with a recital of correspondence with counsel. Nor is it necessary to set out the content of the procedural orders issued by the Tribunal,[3] which are all part of the written record of the proceedings. No unresolved procedural issues were extant as of the end of the hearing.

8. On 6 June 2007 Argentina challenged Professor Albert Jan van den Berg pursuant to Article 11 of the UNCITRAL Rules. BG rejected the challenge by letter of 11 June 2007. Professor van den Berg stated his position by letter of 12 June 2007, declining to withdraw from office.

9. Argentina initially refused to submit the challenge to the ICC International Court of Arbitration (ICC Court), the appointing authority under Article 12(1)(b) of the UNCITRAL Rules. Following failure by the Parties to agree on a new authority that would be willing to make a decision on the challenge, Respondent sought the designation of a new appointing authority by the Permanent Court of Arbitration. By letter of 15 August 2007, the Secretary-General of the Permanent Court of Arbitration informed the Parties that it had no power to replace the ICC Court as appointing authority.

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3. The Arbitral Tribunal issued procedural orders on 30 June 2004 (Procedural Order No. 1), 8 November 2004 (Procedural Order No. 2, amended on 24 June 2005, 5 July 2005, 13 July 2005, and 12 August 2005), 3 December 2004 (Procedural Order No. 3), 9 June 2005 (Procedural Orders Nos. 4 and 5), 1 July 2005 (Procedural Order No. 6), 10 February 2006 (Procedural Order No. 7), 14 June 2006 (Procedural Order No. 8) , and 23 May 2007 (Procedural Order No. 9).

Appendix D

10. On 17 September 2007 BG informed the Tribunal of the Parties' joint request for the suspension of the preparation of the award until 1 October 2007. By letter of 3 October 2007 BG informed the Tribunal that the suspension period had expired without the Parties having agreed to an extension and, therefore, that the Tribunal should resume the preparation of the award.

11. On 10 October 2007 Respondent submitted the challenge to the ICC Court. On 21 December 2007 the Secretariat of the ICC Court informed the Parties that, at its session of that same day, the ICC Court had decided to reject the challenge of Professor Albert Jan van den Berg.

12. Respondent filed its *Memorial sobre Excepción de Incompetencia del Tribunal Arbitral* with objections to jurisdiction and admissibility on 24 March 2005. Claimant filed its Counter-Memorial on Jurisdiction on 9 May 2005.

On 9 June 2005 the Arbitral Tribunal decided not to bifurcate the proceedings (Procedural Order No. 5). Hence, this award affirms the jurisdiction of the Tribunal and it also adjudicates the merits of the dispute.

13. The hearing was held on 5, 6, 7, 10, 11, 12, 13 and 14 July 2006 (the Hearing). The following witnesses appeared before the Arbitral Tribunal:

a) Designated by Claimant

- William Adamson

- Richard Souchard
- Jose Luis Fernández
- John Wood-Collins (expert witness)

b) Designated by Respondent

- Eduardo Ratti
- Gustavo Simeonoff
- Cristian Folgar
- Diego Petrecolla and Federico Molina (expert witnesses)
- Alejandro Gallino and Alejandro Sruoga (expert witnesses)
- Benedict Kingsbury (expert witness)

14. All of the witnesses designated by the Parties filed written statements. The following witnesses, however, did not appear at the Hearing:

a) Designated by Claimant

- Patricio Carlos Perkins

b) Designated by Respondent

- Nouriel Roubini (expert witness)

Appendix D

15. In addition to the submissions referred to in paragraph 12, the Parties filed the following written submissions:

Submission	Date
Claimant	
Statement of Claim	7 February 2005
Reply	6 February 2006
Post-Hearing Brief	28 August 2006
Cost Submission	4 June 2007
Respondent	
Memorial de Contestación	7 November 2005
Dúplica	8 May 2006
Alegato Final	28 August 2006
Reply to Claimant's Cost Submission	11 June 2007

III. Findings of Fact

16. The findings of fact set out in this Chapter of the award are based on the documentary evidence and on the written and oral testimony on the record.

A. BG's Investment in Argentina

1. The Privatization of the Gas Industry

17. In 1989 Argentina took economic measures to reduce inflation and the public deficit. Law 23.696 of 17 August 1989 provided, *inter alia*, for the privatization of certain

state- owned companies, including the gas transportation and distribution monopoly *Gas del Estado, Sociedad del Estado* (*Gas del Estado*). Almost two years later, Law 23.928 of 27 March 1991 (the Convertibility Law) established a 1 to 1 fixed parity between the Argentine peso and the US dollar.

18. The gas industry was restructured for the purpose of its privatization as set out in Decree 48/91, Decree 633/91, Law 24.076 (the Gas Law) and Decree 1738/92 (the Gas Decree).

The assets of *Gas del Estado* were divided into two transportation companies and eight distribution companies. One of the gas distribution companies was *Distribuidora de Gas Metropolitana S.A.* This entity's corporate name subsequently changed to MetroGAS.

19. Article 50 of the Gas Law created the *Ente Nacional Regulador del Gas* (ENARGAS), at the time under the responsibility of the *Ministerio de Economía y Obras y Servicios Públicos* (Ministry of Economy, Public Works and Services). ENARGAS was, and remains at the time of the rendering of this award, the regulatory agency charged with the implementation and application of the new legal framework for the privatization of the gas industry in Argentina.

20. The transportation and distribution companies were incorporated by Decree 1189/92 and the privatization process was launched with the publication on 21 July 1992 of Resolution 874/92 of 12 July 1992, which called for an

international public tender to sell a controlling interest in the transportation and distribution companies. The terms, conditions and rules governing the public bid were set out in the Bidding Rules issued by the *Ministerio de Economía y Obras y Servicios Públicos* (the Bidding Rules).[4] Resolution 874/92 also provided for the sale of a 70% interest in MetroGAS.

21. The Republic of Argentina promoted the international public tender among foreign investors by means of an English language memorandum dated "September 1992" (the Information Memorandum).[5]

22. On 2 December 1992, Decree 2255/92 approved model licenses for the provision of gas transportation and distribution services by the companies to be privatized.

23. Finally, on 21 December 1992, the President of Argentina issued Decree 2459/92, which granted the predecessor of MetroGAS an exclusive license to distribute natural gas in an area comprising the City of Buenos Aires and the southern and eastern greater metropolitan Buenos Aires (the MetroGAS License).[6] Decree 2459/92 was also signed by Dr. Domingo F. Cavallo, then Minister of *Economía y Obras y Servicios Públicos*.

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4. Exhibit J-100.

5. Exhibit J-101.

6. Exhibit J-113.

Appendix D

2. BG's Participation in the Privatization Process

24. Gas Argentino, S.A. (GASA) was the successful bidder for the 70% ownership interest of MetroGAS that was tendered for sale by Respondent in 1992. GASA was formed by BG, *Compañía Naviera Pérez Companc S.A. Comercial, Financiera, Inmobiliaria, Minera, Forestal y Agropecuaria* (Pérez Companc), *Astra Compañía Argentina de Petróleo S.A.* (Astra) and Invertrad S.A.[7] (the Initial Shareholders) for the sole purpose of holding this ownership interest. BG initially owned 41% of GASA. On 11 August 1998 BG acquired an additional 13.67% interest from Pérez Companc through British Gas International BV, its wholly owned subsidiary (BG International).[8]

25. On 28 December 1992, GASA, the Initial Shareholders, MetroGAS, the *Estado Nacional* and *Gas del Estado* entered into a Share Transfer Agreement.[9] The *Estado*

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7. On 20 January 1993, Invertrad S.A. assigned its 14% interest in GASA to Argentina Private Development Trust Company Limited (APDT). APDT subsequently changed its corporate name to Argentina Private Development Company Limited and assigned all its shares in GASA to YPF.

8. BG International is a wholly owned subsidiary of BG Gas Netherlands Holding BV (BGNH, also a wholly owned subsidiary of BG. On 12 November 1993, BG transferred to BGNH all of its shares in GASA. Subsequently, BGNH's GASA shares were transferred to BG International.

9. Exhibit J-115. MetroGAS and BG also entered into a Technical Assistance Agreement dated 28 December 1992 and renewed on 28 December 2002.

Nacional and *Gas del Estado* were represented by the *Ministerio de Economía y Obras y Servicios Públicos.*

26. After the Share Transfer Agreement, Argentina continued to own 30% of MetroGAS, but it immediately transferred 10% to an employee share program. In 1994, Argentina offered the remaining 20% for sale in 1994 on the Argentine stock market and on the New York Stock Exchange. Between 1994 and 1998, BG increased its investment in MetroGAS from 28.7% (held through GASA) to 45.11% (held through GASA and BG International).[10]

B. The Regulatory Framework

27. The Regulatory Framework allegedly relied upon by BG at the time of its investment in Argentina included:

a) Law 24.076 of 20 May 1992 (the Gas Law);

b) The Gas Decree 1738 of 18 September 1992 (the Gas Decree); and

c) The MetroGAS License dated 21 December 1992 (the MetroGAS License).

28. The Tribunal will examine these legal texts *seriatim*.

1. The Gas Law (20 May 1992)

29. One of the stated objectives of the Gas Law was to guarantee that the tariffs to be collected for the regulated

10. BG, through BG International, purchased additional shares in MetroGAS in 1994 (5.5%) and 1998 (1.34%).

services were to be "*. . . justas y razonables de acuerdo a lo normado en la presente ley*".[11]

30. Pursuant to the Bidding Rules and the Information Memorandum, the foundations for the tariff regime are to be found in Title IX of the Gas Law. Thus, the following principles of the Gas Law are relevant to ascertain the expectations of the Parties at the time:

a) gas distributors operating efficiently and prudently were to be given the opportunity to collect "*. . . ingresos suficientes para satisfacer todos los costos operativos razonables . . . impuestos, amortizaciones y una rentabilidad razonable . . .*";[12]

b) to achieve "*rentabilidad razonable*", tariffs would provide for a return commensurate to the return of other activities of equal or comparable risk, and they must be a function of the efficient and satisfactory delivery of service;[13]

c) tariffs would be adjusted by applying a methodologybased on international market indicators "*. . . que reflejen los cambios de valor de bienes y servicios representativos*

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11. Article 2(d).

12. Article 38(a).

13. Article 39.

de las actividades de los prestadores . . .";[14] and

d) tariffs would be subject to review every five years,[15] or on an extraordinary basis.[16]

31. The Gas Law does not expressly address the currency in which the tariffs were to be calculated or expressed. The transportation and distribution tariffs are the object of regulation in the Gas Decree and in the MetroGAS License, to which this award now turns.

2. The Gas Decree (18 September 1992)

32. Article 41(1) of the Gas Decree introduces the US dollar as the currency in which to assess and calculate the value of transportation and distribution tariffs.

En la adecuación normal y periódica de la tarifas que autorice, [ENARGAS] *se ajustará a los siguientes lineamientos:*

(1) Las tarifas de Transporte y Distribución se calcularán en Dólares.[17] *El Cuadro Tarifario*

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14. Article 41.

15. Article 42.

16. Upon the request of the service provider (Article 46), or *ex officio* by ENARGAS (Article 47).

17. Article 1(1) of the Gas Decree defines "*Dólar*" as "*. . . la moneda de curso legal en los Estados Unidos de América*".

resultante será expresado en pesos convertibles según la Ley No. 23.928,[18] *teniendo en cuenta para su reconversión a pesos la paridad establecida en el Artículo 3 del Decreto No. 2.128/91.*[19]

33. Paragraph 3 of Article 41 of the Gas Decree builds on Article 41 of the Gas Law by requiring incorporation in the respective licenses[20] of a mandatory tariff adjustment methodology based on international market indicators.

34. Moreover, Article 42 of the Gas Decree fixes a time limit for ENARGAS to issue rules relating to the methodology for the review of tariffs every five years, as provided in Article 42 of the Gas Law. The Gas Decree offers some guidance to the regulator:

(. . . .) *La revisión global del método empleado para el cálculo de las tarifas . . . se mantendrá por un nuevo período de Cinco (5) años contados a partir de su vigencia, procurando observar los principios de estabilidad, coherencia y*

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18. The Convertibility Law (Exhibit J-79).

19. Article 3 of the *Decreto No. 2.128/91* (Exhibit J-86) establishes a 1 to 1 parity between the Argentine peso and the US dollar ("*El PESO será convertible con el Dólar de los ESTADOS UNIDOS DE AMERICA, a una relación de UN PESO . . . por cada Dólar, para la venta, en las condiciones establecidas por la Ley 23.928*").

20. Though Article 41 of the Gas Decree uses the Spanish term *habilitaciones*, Article 4.5 of the Decree provides that such *habilitaciones* take the form of a license.

previsibilidad tanto para los Consumidores como para los Prestadores.

[ENARGAS] establecerá las normas de procedimiento para la revisión del método empleado en el cálculo de las tarifas que asegure la participación de los sujetos de la Ley (. . . .)

35. Article 46 of the Gas Decree provides in turn for a set of guidelines to proceed with the extraordinary review of tariffs:

[ENARGAS] deberá establecer los requisitos que deberán cumplir los Transportistas, Distribuidores o consumidores en sus solicitudes de modificación de Tarifas o del Reglamento del Servicio a fin de acreditar la necesidad de tales modificaciones.

Las modificaciones contempladas en el Artículo 46 de la Ley deberán basarse en circunstancias específicas no previstas con anterioridad, y no podrán ser recurrentes. Las mismas no incluyen el reajuste que contempla el Artículo 42 de la Ley.

36. This analysis of the Gas Decree concludes by restating one of its opening provisions. Article 4.5 gives reassurance to licensees that their license may not be modified without their consent:

(. . . .) *Las licencias otorgadas no . . . serán modificadas durante su vigencia sin el*

consentimiento de los licenciatarios. No se considerarán modificaciones a la licencia (i) las modificaciones que [ENARGAS] introduzca en el Reglamento del Servicio, sin perjuicio del derecho de [ENARGAS] o del licenciatario a requerir el correspondiente ajuste de las tarifas si el efecto neto de tal modificación alterase en sentido favorable o desfavorable, respectivamente, el equilibrio económico - financiero existente antes de tal modificación; y (ii) los reajustes de la Tarifa que conste[n] como anexo de la licencia y que se practiquen de acuerdo con la Ley, esta Reglamentación y los términos de la respectiva licencia. Al convocar a licitación en caso de extinción de una licencia, [ENARGAS] podrá modificar los términos de la licencia vigente hasta ese momento.

37. The interpretation of the Gas Law and the Gas Decree was the object of considerable disagreement between the Parties. The Tribunal will address that controversy later in this award. In so doing, the Tribunal will turn to the Bidding Rules and to the Information Memorandum in order to ascertain the understanding of the parties at the time of the conclusion of their agreement.

3. The MetroGAS License (21 December 1992)

38. On 21 December 1992 the President of Argentina issued Decree 2459/92 which granted the predecessor of MetroGAS a 35 year exclusive license to distribute natural gas in the City of Buenos Aires and the southern

and eastern greater metropolitan Buenos Aires.[21] As indicated above, Decree 2459/92 was also signed by Dr. Domingo F. Cavallo, then Minister of *Economía y Obras y Servicios Públicos*.

39. The text of Decree 2459/92 is itself brief. It comprises eight Articles over six pages, plus three Annexes setting out in detail the terms of the MetroGAS License: (i) the *Reglas Básicas* (Annex I); (ii) the *Reglamento de Servicio* (Annex II); and (iii) the Tariffs (Annex III). The provisions of the MetroGAS License relevant to the dispute between the Parties are primarily located in Annex I (*Reglas Básicas*).

40. Before an examination of the rules set out in Annex I, the Tribunal records that Article 1 of this Presidential Decree provides that the MetroGAS License is granted under the terms and conditions set out, *inter alia*, in the Gas Law, the Gas Decree, Annex I (*Reglas Básicas*) and Annex III (Tariffs).

41. Section 9.2 of the MetroGAS License[22] confirms the application of the US dollar as the currency of reference for the calculation and adjustment of tariffs:

> *El Anexo III del Decreto que aprueba estas Reglas Básicas contiene la tarifa que puede percibir la*

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21. Exhibit J-113 (the MetroGAS License was subject to a 10 year extension).

22. Unless otherwise specified, all references in the award to Sections of the MetroGAS License are to Sections in Annex I (*Reglas Básicas*).

Licenciataria.

La tarifa se ha calculado en dólares estadounidenses. Los ajustes a que se refiere el punto 9.3. serán calculados en dólares estadounidenses.

El Cuadro Tarifario resultante o recalculado se expresará en el momento de su aplicación a la facturación en pesos ($) a la relación para la convertibilidad establecida en el art. 3° del Dto. 2128/91, reglamentario de la [Ley de Convertibilidad] y sus eventuales modificatorios.

Dicha tarifa sólo será modificada de conformidad con lo establecido en la Ley [24,076],[23] *el Decreto Reglamentario,*[24] *estas Reglas Básicas y las disposiciones de la misma Tarifa.*

42. The tables of Annex III (*Tarifas*) setting out the different tariffs indicate in the upper right hand corner that they are expressed "*en $ convertibles ley 23,928*".[25]

43. Section 9.3 of the MetroGAS License sets out a useful recapitulation of the tariff adjustment regime:

De acuerdo con los términos de la Ley y su Decreto Reglamentario, se prevén las siguientes clases de ajustes de tarifas:

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23. The Gas Law.

24. The Gas Decree.

25. Law 23,928 is the Convertibility Law.

Appendix D

a) Periódicos y de tratamiento preestablecido

- *Ajuste por variaciones en los indicadores de mercado internacional (artículo 41 de la Ley)*

- *Ajuste por variaciones en el precio del Gas comprado*

- *Ajuste por variaciones en el costo del Transporte*

b) Periódicos y de tratamiento a preestablecer por la Autoridad Regulatoria

- *Ajuste por la revisión quinquenal de tarifas (artículo 42 de la Ley)*

c) No recurrentes

- *Ajuste basado en circunstancias objetivas y justificadas (artículo 46 de la Ley)*

- *Ajuste por cambios en los impuestos (artículo 41 de la Ley)*

44. To summarize further the adjustment provisions of the MetroGAS License:

a) tariffs would be adjusted every six months in accordance with the US PPI (the US PPI

Adjustment);[26]

b) MetroGAS was entitled to a review every five years to maintain tariffs at a level sufficient to provide a reasonable rate of return after covering costs, taking into account the licensees efficiencies and investments (the Five Year Review);[27] and

c) outside the Five Year Review, MetroGAS could also request an "extraordinary review" based on "objective and justified" grounds (the Extraordinary Review).[28]

45. It is a matter of record that only one Five Year Review was completed with respect to MetroGAS (RQT I in 1997), and that a second Five Year Review (RQT II) was in progress in January 2002, but was never concluded. On 8 February 2002, ENARGAS notified MetroGAS that the RQT II process was suspended pending completion of the renegotiation process mandated by Law 25.561 adopted on 6 January 2002 (the Emergency Law).[29]

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26. Section 9.4.1.1 of the MetroGAS License. The License defines "PPI" as " . . . *el 'Indice de Precios del Productor – Bienes Industriales (1967 = 100) publicado por la Oficina de Estadísticas Laborales del Departamento de Trabajo de los Estados Unidos* . . .".

27. Sections 9.4.1.2, 9.4.1.3 and 9.4.1.4 of the License.

28. Section 9.6.1 of the License.

29. Exhibit J-295.

Appendix D

46. The MetroGAS License also provides for the stability of the Regulatory Framework and its tariff regime.

47. First, Section 9.1 of the MetroGAS License requires that modifications to the *Reglamento de Servicio* be responsive to the evolution and need to improve service, and it calls for consultations with the licensee and a tariff adjustment if the economic and financial equilibrium is disturbed:

> *El Reglamento del Servicio podrá ser modificado periódicamente, después de la fecha de vigencia, por la Autoridad Regulatoria, para adecuarlo a la evolución y mejora del Servicio Licenciado. Cuando tales modificaciones no se deban a la iniciativa de la Licenciataria, corresponderá la previa consulta a la misma. Dichas modificaciones no podrán alterar las presentes Reglas Básicas y, si alteraran el equilibrio económico-financiero de la Licencia, darán lugar [a la] revisión de la Tarifa según lo determine la Autoridad Regulatoria.*

48. Section 18.2 of the MetroGAS License further elaborates on the principles of stability and compensation:

> *El Otorgante no modificará estas Reglas Básicas, en todo o en parte[,] salvo mediante consentimiento escrito de la Licenciataria y previa recomendación de la Autoridad Regulatoria.*
>
> *Las disposiciones que modifiquen el Reglamento del Servicio y la Tarifa que adopte la Autoridad*

> *Regulatoria no se considerarán modificaciones a la Licencia en ejercicio de sus facultades, sin perjuicio del derecho de la Licenciataria de requerir el correspondiente reajuste de la Tarifa si el efecto neto de tal modificación alterase en sentido favorable o desfavorable, respectivamente, el equilibrio económico-financiero existente antes de tal modificación.*

49. Second, Section 9.8 of the License provides as follows with respect to price controls:

> *No se aplicarán al régimen de tarifas de la Licenciataria congelamientos, administraciones y/o controles de precios. Si a pesar de esta estipulación se obligara a la Licenciataria a adecuarse a un régimen de control de precios que estableciere un nivel menor al que resulte de la Tarifa, la Licenciataria tendrá derecho a una compensación equivalente pagadera por el Otorgante.*

50. Upon expiration of the license term, MetroGAS would be entitled to receive compensation in cash to the lower of:[30]

a) the net book value of the assets;[31] and

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30. Section 11.3.1 of the MetroGAS License.

31. *I.e*, the book value net of cumulative amortization of the essential assets, including historical cost (also net of cumulative amortization) of the investments made by the Licensee during the

b) the net proceeds of a new competitive bid.

51. Finally, the MetroGAS License is governed by the laws of Argentina and it includes the following jurisdictional clause in Section 16.2:

> *Para todos los efectos derivados de la presente Licencia en su relación con el Otorgante,*[32] *la Licenciataria se somete a la competencia de los tribunales en lo Contencioso Administrativo Federal de la Capital Federal. En las controversias con otras partes relativas a la Licencia, será competente la justicia federal.*

52. The Tribunal will now turn to the crisis which precipitated the dispute between the Parties.

C. The Crisis

53. Starting in 1998, external developments contributed to the demise of the currency regime implemented by,

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term of the License not challenged by ENARGAS. For purposes of this calculation, (a) investments are to be determined on the basis of the price paid for the essential assets by MetroGAS in 1992, plus the original cost of subsequent investments, converted into dollars and adjusted by US PPI, and (b) amortization shall be calculated in US dollars applying normal rules of useful life of the assets, regardless of the historic cost in Argentine currency or accelerated amortization for fiscal purposes (Section 11.3.1 of the MetroGAS License).

32. Section 1.1 of the License defines *Otorgante* to mean "the National Executive Branch" (*el Poder Ejecutivo Nacional*).

inter alia, the Convertibility Law:[33]

a) capitals stopped flowing to emerging markets following the Asian crisis and the Russian default of 1998;

b) demand weakened in Brazil, one of Argentina's major trading partners;

c) the price of Argentina's exports relative to its imports decreased considerably;

d) Argentina lost competitiveness abroad as a result of the devaluation of the Brazilian currency and the appreciation of the dollar; and

e) monetary policy was tightened by the U.S. Federal Reserve in 1999 and 2000.

54. Given the Convertibility Law, Argentina could not apply exchange rate adjustments and it lacked a monetary policy to address the combined effect of these external developments.[34] This led to a slowdown of the economy in 1998 and Argentina eventually plunged into a profound recession.[35] The recession worsened in 2001, precipitating an acute economic, social and political crisis.

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33. Roubini Witness Statement, pp. 7 and 8.

34. Roubini Witness Statement, pp. 7 and 8.

35. Roubini Witness Statement, p. 8.

Appendix D

55. Between 1999 and 2002, cumulative loss of GDP was about 25% and real *per capita* GDP fell from $8,302 in 1998 to $2,595 in 2002.[36] Public debt and the fiscal deficit increased.[37]

56. On 1 December 2001, Decree 1570/01 imposed exchange controls and severe restrictions on the withdrawal of funds from the banking system (the *corralito*).[38] Argentina subsequently declared a default on its foreign debt and the IMF withheld funds scheduled to be delivered to Argentina by the end of that year. The IMF also publicly withdrew its support of Argentina's economic program.[39]

57. The attack on the peso intensified. In the first days of December 2001 on average 500 million dollars were being withdrawn from the banking system every day. During the last quarter of that year the Central Bank lost 11 billion dollars of reserves and 25% of funds on deposit vanished

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36. Roubini Witness Statement, p. 9.

37. Fiscal debt increased to 8% of GDP and the Balance of Payments Current Account showed deficits every year between 1999 and 2001 (Folgar Witness Statement, p. 6).

38. Exhibit J-282. *Corralito* was the informal name for these measures taken in order to stop a bank run. The *corralito* almost completely froze bank accounts and forbade withdrawals from U.S. dollar-denominated accounts. The Spanish word *corralito* is the diminutive form of *corral*, which means "corral, animal pen, enclosure". The term alludes to the restrictions imposed by the measure.

39. *Memorial de Contestación*, paragraphs 46 and 48.

from the financial system.[40]

58. The crisis had social and political repercussions.

59. In May of 2002 unemployment peaked at 21.5% from 18.3% in October of 2001.[41] Average wages decreased almost 70% in 7 months, from US $569.90 in October of 2001 to US $190.00 in May of 2002.[42] By the first quarter of 2002, domestic consumption, including demand for public services, had shrunk 20%.[43]

60. Five Presidents took office within a period of 12 days. On 1 January 2002, Eduardo Duhalde became President and on 6 January 2002 Argentina enacted the Emergency Law, declaring a state of emergency throughout the country.[44] The Parties disagree as to whether the state of emergency has been overcome.[45] The state of emergency is currently set to expire on 31 December 2007.[46]

61. The next Section of the award describes the *corralito*, the Emergency Law and other measures taken by the government of Argentina to address the crisis.

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40. *Memorial de Contestación*, pp. 10 and 11.

41. Folgar Witness Statement, p. 6.

42. *Memorial de Contestación*, paragraph 116.

43. *Memorial de Contestación*, paragraph 65.

44. Exhibit J-287.

45. *Dúplica*, paragraph 87. Reply, paragraph 482.

46. See paragraph 73 of this award.

Appendix D

D. The Measures

62. Starting in 1999, Argentina adopted a series of measures to address macroeconomic pressures, social unrest and political instability. These measures had an effect on BG's investment in MetroGAS and their examination is critical to the adjudication of this dispute.

1. Suspension of the Application of the US PPI

63. At the invitation of the Secretary of Energy, on 6 January 2000 all licensees, including MetroGAS, agreed to a six month suspension (until 1 July 2000) of the US PPI adjustments pursuant to the Gas Law (Article 41), the Gas Decree (Article 41) and the MetroGAS License (Section 9.4.1.1 of the *Reglas Básicas)* until 1 July 2000. The *Acta Acuerdo*[47] which formalizes this agreement stated that:

a) the suspension was exceptional "*. . . y por única vez*";[48]

b) the suspension was without prejudice to the integrity of the Regulatory Framework, the licenses and the "*. . . compromisos y contratos celebrados como resultado de la privatización de Gas del Estado*";[49]

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47. Exhibit J-214.

48. Exhibit J-214, paragraph 1.

49. Exhibit J-214, paragraph 2 of the Preamble.

c) the licensees would not be indemnified in case of damage suffered as a result of the suspension;[50] and

d) the suspension should not be deemed as a precedent, or as an amendment to the existing legal framework.[51]

64. Argentina did not implement the adjustment upon expiry of the suspension on 1 July 2000. Instead, the government once again invited the licensees to accept a two-year deferral of the adjustment.[52] Pursuant to the new agreement, dated 17 July 2000:

a) tariffs payable as from July 2000 could be increased by the US PPI uplift due in January 2000; and

b) the US PPI adjustments applicable from July 2000 to January 2002 were to be deferred until 30 June 2002.

65. This agreement was formalized by Decree 669/00, signed by the President of Argentina. Decree 669/00 recognized that the licensees had a "*derecho legítimamente adquirido*" to US PPI tariff adjustments.[53]

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50. Exhibit J-214, paragraph 5 of the Preamble.

51. Exhibit J-214, paragraph 5 of the Preamble.

52. Exhibit J-226.

53. Exhibit J-226, p. 2.

Appendix D

The Presidential Decree also acknowledges that bilateral investment treaties are a part of the legal framework relevant to investments in Argentina.[54]

66. Decree 669/00 and the agreement concluded on 17 July 2000 were challenged before local courts by the Argentine Ombudsman (*Defensor del Pueblo de la Nación*) on grounds that the US PPI adjustment mechanism was unconstitutional and in breach of the amended Convertibility Law. On 18 August 2000, a federal administrative court (the *Juzgado Nacional de Primera Instancia en lo Contencioso Administrativo Federal No. 8*) issued an injunction staying the application of Decree 669/00 and the agreement of 17 July 2000.[55]

67. The injunction was appealed by both MetroGAS and the Argentine authorities. The appeal memorial filed by the Ministry of Economy and ENARGAS sheds light on the purpose of the Regulatory Framework:

> *Cuando en los años noventa se encaró en la Argentina el amplio proceso privatizador, la inflación no había sido derrotada. Para atraer inversores, en ese contexto se decidió ofrecer un marco contractual que asegurara la estabilidad de la ecuación económica inicial, evitando que las tarifas fueran licuadas por el incesante aumento de precios, al punto de hacer inviable la explotación rentable de la actividad.*

54. Ibidem, p.1.

55. Exhibit J-229.

Appendix D

El instrumento elegido, en la mayoría de los casos, fue fijar tarifas en dólares con la cláusula de ajuste según la inflación estadounidense, que históricamente había seguido un curso mucho más estable que la argentina.

[Exhibit J-233, p. 71]

[D]ebe tenerse en cuenta cuál es el sentido que, en momento del procedimiento licitatorio, se le dio al ajuste en cuestión. . . . Tal sentido está dado en que, en primer lugar, las ofertas económicas de los Consorcios que participaron en la Licitación – teniendo en cuenta las condiciones del Pliego de Bases y Condiciones-, preveían la aplicación del ajuste mencionado durante la vigencia de la habilitación.

[Exhibit J-233, p. 95]

[Emphasis added]

68. Pending the decision on appeal, in August of 2000 and every 6 months thereafter, ENARGAS ordered MetroGAS to maintain its tariffs at the approved rate for May of 2000.[56]

69. On 5 October 2001, the Federal Court of Appeals upheld the injunction against the application of the US PPI adjustment mechanism.[57] In reaching its decision, the

56. Exhibits J-238, J-252 and J-285.

57. Exhibit J-253.

appellate court noted that "dollarized" tariffs protected the licensees against exchange rate fluctuations.[58] An appeal to the Supreme Court was soon to be overtaken by other measures adopted by Argentina in January of 2002. The MetroGAS tariffs have therefore not been adjusted for inflation since July of 1999.[59]

2. The *Corralito*

70. By the end of 2001 Argentina was heavily indebted and with an economy in stagnation. Pegging the exchange rate at one U. S. dollar per Argentine peso further made its exports uncompetitive and it also effectively deprived the state of an independent monetary policy. Fearing an economic crash and a devaluation, many Argentines, especially companies, were transforming pesos to dollars and withdrawing them from the banks in large amounts, usually transferring them to foreign accounts.

71. On 1 December 2001, the government enacted Decree 1570/01 in order to stop this process from further threatening the banking system.[60] This Decree froze all

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58. Exhibit J-253, p. 10 ("*. . . si se tiene en cuenta la dolarización de las tarifas y el seguro de cambios que ello implica . . .*")

59. Decree 2437/02 (Exhibit J-371) authorized 5 to 10% increases in the tariffs of MetroGAS. However, the application of this decree was suspended by judicial injunction. Further attempts to increase tariffs were also blocked by injunctive measures adopted by Argentine courts (Exhibits J-398 and J-401).

60. Exhibit J-282.

bank accounts, initially for 90 days. Only a small amount of cash was allowed for withdrawal on a weekly basis, initially 250 pesos.

72. The *corralito* had a paradoxical effect. Attempts to withdraw funds from the banks intensified and the cash restrictions exacerbated the recession and angered the public. President Fernando de la Rúa resigned on 21 December 2001 after violent riots, but the restrictions of the *corralito* were not lifted at the time.

3. The Emergency Law and Ancillary Regulations

73. On 6 January 2002, Argentina enacted the Emergency Law.[61] This Law declared a state of "emergency" for a limited period of time originally due to expire on 10 December 2003,[62] but subsequently extended until 31 December 2004,[63] 31 December 2005,[64] 31 December 2006[65] and 31 December 2007.[66]

74. Among other measures, the Emergency Law:

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61. Exhibit J-287.

62. This is the date which appears in Article 1 of the Emergency Law as submitted by Argentina in its Exhibit A RA-131.

63. Exhibit J-448.

64. Exhibit J-505.

65. Exhibit J-643.

66. Exhibit J-740.

a) abolished the currency board established by the Convertibility Law which had pegged the peso to the dollar;[67]

b) set aside dollar denominated adjustment clauses;[68]

c) eliminated the US PPI adjustment mechanism by prohibiting indexation clauses tied to international price indices;[69]

d) converted dollar denominated tariffs into pesos at the rate of one peso to one US dollar;[70]

e) prohibited licensees from suspending or altering the performance of their obligations;[71] and

f) prescribed that the law would be applicable irrespective of any "vested rights".[72]

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67. Article 3.

68. Article 8.

69. Article 8.

70. Article 8. Thus, while the exchange rate eventually stabilized at 3 Argentine pesos to the US dollar, the devaluation was not transferred to the licensees' tariffs.

71. Article 10. This rule is also included in Article 5 of Law 25.790 of 1 October 2003.

72 Article 19 ("*La presente ley es de orden público. Ninguna persona puede alegar en su contra derechos irrevocablemente adquiridos*".) This provision is in contrast with Decree 669/00

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75. The Emergency Law also authorized the Executive Branch of government to "renegotiate" its agreements with public service providers.[73] Originally conducted under the auspices of the *Comisión de Renegociación de Contratos de Obras y Servicios Públicos* which operated from February of 2002 until July of 2003,[74] the renegotiation process was subsequently taken over by the *Unidad de Renegociación de Contratos de Obras y Servicios Públicos* or UNIREN.[75]

76. Article 11 of the Emergency Law and Decree 214/02[76] further (i) ordered that private dollar denominated obligations be converted into pesos at a rate of one peso to one dollar, and (ii) abolished indexation by reference to international indicators. Decree 214/02 also

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(Exhibit J-226) which had earlier recognized that the licensees had a "*derecho legítimamente adquirido*" to US PPI tariff adjustments.

73. Article 9 ("*Autorízase al Poder Ejecutivo nacional a renegociar los contratos comprendidos en lo dispuesto en el Artículo 8º de la presente ley. En el caso de los contratos que tengan por objeto la prestación de servicios públicos, deberán tomarse en consideración los siguientes criterios: 1) el impacto de las tarifas en la competitividad de la economía y en la distribución de los ingresos; 2) la calidad de los servicios y los planes de inversión, cuando ellos estuviesen previstos contractualmente; 3) el interés de los usuarios y la accesibilidad de los servicios; 4) la seguridad de los sistemas comprendidos; y 5) la rentabilidad de las empresas.*")

74. Exhibit J-297.

75. Exhibit J-424.

76. Exhibit J-292.

established that "pesified" obligations were to be adjusted by application of a *Coeficiente de Estabilización de Referencia* or CER. Pursuant to Decree 410/02, however, the "pesification" would not apply to obligations governed by foreign law.[77]

77. During the arbitration, BG argued that these and other measures adopted by Argentina after January of 2002 had a discriminatory effect which adversely impacted its investment in Argentina. Chapter VIII of this award shall address the measures in question and their effect in the renegotiation process.

4. The Renegotiation Process

78. The *Comisión de Renegociación de Contratos de Obras y Servicios Públicos* was created by Decree 293/02 of 14 February 2002 to assume responsibility over the renegotiation of public service contracts.[78] Although this Renegotiation Commission was unable to conclude its task within the statutory term of 120 days, it did produce a report dated 24 January 2003 which notes a sharp decline in the economics of the MetroGAS operations:[79]

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77. Exhibit J-300.

78. Exhibit J-297.

79. Exhibit J-400, p. 44.

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Net Margin over Sales		Rate of Return	
2001	2002	2001	2002
14%	-121%	8%	-142%

79. On 3 July 2003, the administration of President Kirchner replaced the *Comisión de Renegociación de Contratos de Obras y Servicios Públicos* with UNIREN.[80] On 21 October 2003, Congress enacted Law 25.790 governing the renegotiation process.[81] Article 2 of this Law 25,790 expressly authorized UNIREN to depart from the existing Regulatory Framework and licenses:

> *Las decisiones que adopte el Poder Ejecutivo nacional en el desarrollo del proceso de renegociación no se hallarán limitadas o condicionadas por las estipulaciones contenidas en los marcos regulatorios que rigen los contratos de concesión o licencia de los respectivos servicios públicos.*
>
> [. . .]
>
> [Emphasis added]

80. There is no dispute between the Parties that the stated objective of the Emergency Law and the purpose

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80. Decree 311/03 (Exhibit J-424).

81. Exhibit J-432.

of subsequent legislation, including Law 25.790, was to establish a new deal with the licensees. Return to the original legal framework as presented by the Information Memorandum and the Bidding Rules was accordingly not an alternative.[82] This was confirmed at the hearing by the Executive Secretary of UNIREN, who testified that a return to dollar denominated tariffs was not possible.[83]

81. Further, Article 11 of Resolution 308/02[84] and Article 1 of Decree 1090/02[85] expressly exclude from the renegotiation process any licensee that sought redress in an arbitral or other forum.

82. In the circumstances, five years[86] failed to yield a successful settlement of the dispute between the Parties.

IV. Summary of the Contentions of the Parties and Relief Sought

83. The prayer for relief below is presented *verbatim* as submitted by the Parties in their Post–Hearing Brief. Their contentions are summarized here and subsequently analyzed in more detail.

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82. Exhibit J-297.

83. Tr. Simeonoff, 10 July 2006, 1048:13-1050:3. Respondent's counsel also confirmed this (Tr. Scr[illegible]zi, 6 July 2006, 408:8-409:20).

84. Exhibit J-347.

85. Exhibit J-334.

86. The time elapsed since promulgation of the Emergency Law.

Appendix D

A. BG's Position

84. Claimant argued that Argentina's measures described in Section III.D above have damaged MetroGAS:[87]

> In short, as a result of Argentina's Measures, MetroGAS's business is no longer viable. MetroGAS's tariff revenue is no longer sufficient to cover its costs and provide a reasonable rate of return, as promised in the Regulatory Framework. Some three years after the January 2002 Law was enacted, the absence of a renegotiated Licence or material tariff increase means that MetroGAS remains in a critical financial condition and at the mercy of its creditors.

85. BG's case on the merits is that Argentina has breached the following provisions of the Argentina-U.K. BIT:[88]

> a) Article 5, by expropriating BG's (i) shareholding in GASA and MetroGAS and, alternatively, (ii) rights under or related to the MetroGAS License; and
>
> b) Article 2.2 (i) by failing to provide BG fair and equitable treatment and protection and security, (ii) by taking unreasonable and discriminatory measures, (iii) by failing to observe obligations entered into with regard to BG's Investments, and (iv) for acts of its judiciary.

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87. Statement of Claim, paragraph 350.

88. Post-Hearing Brief, Chapters V and VI.

86. BG requests that the Tribunal:

a) declare that the dispute is within the jurisdiction of the Tribunal and that all of Argentina's objections to the jurisdiction and competence of the Tribunal and the admissibility of BG's claims be dismissed;

b) declare that Argentina breached Article 5(1) of the [Argentina-U.K. BIT] by expropriating BG's investment without compensation;

c) declare that Argentina breached Article 2(2) of the [Argentina-U.K. BIT] by mistreating BG's investment in violation of the standards of treatment provided therein;

d) order that Argentina compensate BG in an amount of US $238.1 million plus interest at the average interest rate applicable to US six-month certificates of deposit, compounded semi-annually;

e) award BG any such additional relief as the Tribunal considers appropriate; and

f) order that Argentina pay the costs of these proceedings, including the Tribunal's fees and expenses, and the cost of BG's legal representation, subject to interest.

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B. Argentina's Position

87. Argentina requests the following from the Tribunal:

a) *Se declare la falta de competencia del Tribunal respecto de la controversia planteada por la Demandante, con costas a cargo de BG, incluyendo todos los gastos del Tribunal y los gastos incurridos por la República Argentina en relación con el presente arbitraje;*

b) *Subsidiariamente, se solicita se rechace en forma total la demanda de BG Group plc, con costas.*

88. Argentina's defense on the merits is based on its allegation that it has not breached the Argentina-U.K. BIT and on the doctrine of state of necessity.

V. Applicable Law

89. Both Parties agree that the issue of the law applicable to the dispute is addressed in Article 8(4) of the Argentina-U.K. BIT.[89] Article 8(4) of the BIT provides that:

> The arbitral tribunal shall decide this dispute in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in this dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in

89. *Alegato Final de la República Argentina* ("Alegato Final"), paragraph 107; Post-Hearing Brief, paragraph 137.

relation to such an investment and the applicable principles of international law.

90. This provision points to the application of the treaty itself, Argentine law (including its rules on conflict of laws) and "*the applicable principles of international law*". The Parties do not disagree that these are the relevant sources of law under the Argentina-U.K. BIT.[90]

91. It is undisputed that treaty law determines, for example, who qualifies as an "Investor"[91] as well as the various types of property rights that constitute an "Investment".[92] Equally clear and not subject to dispute by the Parties is that the substantive standards for treatment of investors are matters governed by the treaty, without any need for reference to Argentine law.[93] Indeed, the

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90. See *Alegato Final*, paragraphs 117-21, in particular paragraph 117 ("*...[E]s claro que el Tribunal no podría dejar de aplicar el derecho interno argentino así como tampoco podría dejar de aplicar el TBI o los principios de derecho internacional que resulten aplicables.*"). See also, Post-Hearing Brief, paragraphs 137-40.

91. Argentina-U.K. BIT, Article 1(c)(i)(bb).

92. Argentina-U.K. BIT, Article 1(a).

93. Respondent does not question that breach of the substantive obligations set out in Articles 2.2 and 5 of the Argentina-U.K. BIT is governed by the BIT. See, *e.g.*, *Alegato Final*, paragraph 132 (*"[l]a Argentina sólo podrá ser responsable internacionalmente si el Tribunal, partiendo del análisis de todas las fuentes de derecho aplicables, comprueba que la conducta de la Argentina es incompatible con alguna*

preeminence of the BIT as *lex specialis* governing this dispute, on matters expressly covered by this bilateral treaty, is expressly acknowledged by both Parties.[94]

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disposición del TBI"). See also ibidem, paragraph 137. After pointing to the prominent role played by Argentine law in defining the type of property rights making up an "investment", referring to El Paso Energy International Co. v. República Argentina (CIADI ARB.03/15/, Decisión sobre Jurisdicción 27 April 2006), Argentina highlights the relevance of ascertaining whether the investor's rights may have been illegally restricted and whether such restriction may be imputed to Argentina for having violated "the high standards" set forth in the BIT ("[e]n conclusión: la República Argentina considera que para determinar qué derechos posee la Demandante, su existencia y extensión, debe aplicarse:

- *el derecho argentino, a efectos de determinar qué derechos fueron adquiridos mediante la inversión;*
- *una vez determinado esto, debe verse si ese derecho ha sido ilegalmente restringido; y*
- *por último, si tal restricción constituye además una violación a los altos estándares del TBI atribuible al Estado Argentino."*

94. See *Alegato Final*, paragraph 118 ("[*l*]*a primera fuente de derecho contenida en el artículo 8.4 del TBI es el mismo tratado. Es claro que las cuestiones reguladas por el Tratado son ley especial (lex specialis) respecto del derecho internacional general . . .*"; subsequently making the point that the BIT is not a self-contained, stand-alone legal framework but must be "integrated" with underlying principles of international law. BG's Post-Hearing Brief, paragraph 140 (also contending that ". . . *the conduct of the host state [must be] examined on the basis of the*

92. It is also beyond dispute that the contours of the concept of "asset" included in the definition of "investment" in Article 1(a) of the Argentina-U.K. BIT, is governed by Argentine law.[96] Article 1(a) of the BIT provides that:

> "investment" means every kind of asset defined in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made . . .
>
> [Emphasis added]

93. Where Claimant and Respondent disagree is on: (i) whether the Argentina-U.K. BIT requires the Tribunal to follow an order of priority in applying the sources of law set out in Article 8(4) of the BIT; and (ii) whether Argentina's

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substantive standards of treatment set out in the treaty. Thus, the treaty as supplemented by general international law is the applicable law in this phase.").

95. See *Alegato Final*, paragraph 124 ("*Es decir, el derecho argentino es el que determina cuáles son los derechos adquiridos por la inversión (en otras palabras: cuál es el contenido de la propiedad del inversor*"); Post-Hearing Brief, paragraph140 ("[a]t *the first stage, the tribunal must decide, if it is a matter of contention, whether particular assets or rights constituting the alleged investment exist, their scope and in whom they vest. The law of the host state and/or the investment constitute an investment as defined by the treaty*"). Although Argentine private international law is included within the bodies or sources of law mentioned in Article 8(4) of the BIT, neither Party relied upon it, so the matter under discussion here is the role played by Argentine substantive municipal rules of law.

alleged liability is exclusively a function of domestic law, as argued by Respondent, or whether this issue falls squarely under the terms of the BIT and underlying principles of international law, as argued by the Claimant.

94. The Tribunal shall deal first, and only to the extent that it is relevant to settle this dispute, with the interplay between international and Argentine internal law under Article 8(4) of the Argentina-U.K. BIT. Second, assuming that the terms of the treaty and underlying principles of international law are silent regarding the protection to foreign investors in a situation of emergency, as propounded by Respondent, the Tribunal shall discuss whether Argentine internal law may be applied to fill the alleged gap.

95. It must be borne in mind that there is no contract concluded between BG and the Republic of Argentina, and that the dispute between the two focuses on the scope of protection to which BG's investment is entitled. Because this is precisely the purpose of the Argentina-U.K. BIT, in adjudicating its jurisdiction and, if need be, the substance of this dispute, the Tribunal must rely on the terms of this bilateral treaty as the primary source of law.

96. Regarding the remission in Article 8(4) of the BIT to national and international law, the Parties seem to make much of the issue whether international law and Argentine law are to be deemed of equal rank, as proposed by Respondent, or whether the latter ought to

yield to the former, as contended by Claimant.[96] In the opinion of the Tribunal this focus is misplaced. In the first place, the doctrinal and jurisprudential authorities brought to the attention of the Tribunal fail to yield any collision or contradiction between the protection to which Claimant's property rights are entitled under Argentine constitutional and administrative law and the protection it receives under international law. If anything, the constitutional jurisprudence developed by the Supreme Court of Argentina around Articles 14 and 17 of the Constitution points to the protection of property rights *lato sensu*,[97] giving rise to a duty to provide full compensation in cases where the State deems it fit for reasons of public policy and regardless of whether an emergency is invoked or not, to unilaterally terminate or modify the terms of a deal concluded with a private party.[98] Thus, the question of the hierarchy that one source

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96. See *Alegato Final*, paragraph 111, referring to Respondent's expert on this issue, Professor Benedict Kingsbury, for the proposition that when the treaty itself refers to the application of domestic law, such domestic law holds equal rank with international law. See also Claimant's Post-Hearing Brief, paragraphs 138 et seq., to the effect that under fundamental principles of international law, the latter prevails over domestic law.

97. See, *e.g.*, Exhibit JL-30 (*Gregorio Guitiérrez v. Compañía Hispano Americana de Electricidad, 158 Fallos 268 (1930)*), holding that the right of property protected by Articles 14 and 17 of the Argentine Constitution refers to all types of interest, tangible or intangible.

98. See, *e.g.*, Exhibit J-14 (*Compañía de Tranvías Anglo Argentina v. Nación Argentina, 262 Fallos 555 (1965)*), where the

of law bears with regard to the other fades in relevance in this case, where property rights would be fully protected under Argentine domestic law in any event.

97. More importantly, the interplay between international law and municipal law under Article 8(4) of the BIT should not overlook that the former may be deemed incorporated into the latter, depending on the status conferred to international treaties and international law in general by a particular constitutional system. This is particularly relevant to the case of Argentina, whose constitutional framework and doctrine have traditionally admitted the direct application of international law whenever feasible and, at least since the constitutional reform undertaken in 1994, expressly providing for the principle that international treaties preempt provincial and federal law.[99] Accordingly, the challenge of discerning the role that international law ought to play in the settlement of this dispute, vis-à-vis domestic law, disappears if one were to take into account that the BIT and underlying principles of international law, as "the supreme law of the land", are incorporated into Argentine domestic law, superseding

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Supreme Court, making clear that it was not passing judgment on the government's sovereign power to adopt any economic policies it deems appropriate, yet held the State liable for the unilateral modification of the terms of a concession contract insofar as it infringed on the concessionaire's right to raise tariffs in order to secure a reasonable right of return.

99. Argentine Constitution (as adopted in 1994), Article 75(22).

conflicting domestic statutes.[100]

98. In its *Alegato Final*, Respondent relied on the unquestionable gravity of the crisis that exploded in December 2001 to introduce the argument that the measures allegedly affecting BG's investment, which found support in the Emergency Law adopted in January 2002,[101] must be regarded as a suitable response to the "extraordinary and unforeseeable" magnitude of the crisis, fully justified under the doctrine of "unforeseeable changed circumstances" (*teoría de la imprevisión*) of Article 1198 of the Argentine Civil Code.[102]

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100. Article 75(22) of the Argentine Constitution.

101. See supra, paragraphs 53 to 62, where this award discusses and acknowledges the extraordinary gravity of the Argentine crisis leading to the adoption of the Emergency Law and ancillary measures.

102. Article 1198, in its current version, was enacted in 1968, incorporating for the first time the "*teoría de la imprevisión*" (or doctrine of unforeseen changed circumstances). Article 1198 provides that:

> "*Los contratos deben celebrarse, interpretarse y ejecutarse de buena fe y de acuerdo con lo que verosímilmente las partes entendieron o pudieron entender, obrando con cuidado y previsión.*
>
> *En los contratos bilaterales conmutativos y en los unilaterales onerosos y conmutativos de ejecución diferida o continuada, si la prestación a cargo de una de las partes se tornara excesivamente onerosa, por acontecimientos extraordinarios e imprevisibles, la parte perjudicada podrá demandar la resolución*

99. The Tribunal notes that Article 1198 relates to the law of contracts and that the dispute between the Parties does not arise out of contract. More specifically, Article 1198 of the Argentine Civil Code does not apply in the context of an international investment dispute governed by Article 8(4) of the Argentina-U.K. BIT.

100. Although the Tribunal finds that the BIT is the primary source of rules to assess Respondent's liability, the bilateral investment treaty is not a self-contained legal framework, isolated from international and domestic law. Yet, the domestic law defense of unforeseen changed circumstances is of little assistance to Respondent here. The process for the privatization of *Gas del Estado* and the resulting Regulatory Framework clearly demonstrate a concern for economic and currency instability, a systemic and hardly unpredictable occurrence in Argentina's modern history.

101. The rejection of the concept of *rebus sic stantibus* under the Argentine Civil Code is not a dismissal of

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del contrato. El mismo principio se aplicará a los contratos aleatorios cuando la excesiva onerosidad se produzca por causas extrañas al riesgo propio del contrato.

En los contratos de ejecución continuada la resolución no alcanzará a los efectos ya cumplidos.

No procederá la resolución, si el perjudicado hubiese obrado con culpa o estuviese en mora.

La otra parte podrá impedir la resolución ofreciendo mejorar equitativamente los efectos del contrato."

Argentina's defense under the international law doctrine of state of necessity. The Tribunal will address this question in Chapter IX of the award.

102. In brief, the Tribunal shall apply:

a) the Argentina-U.K. BIT with respect to the jurisdictional objections raised by Argentina under the treaty itself;

b) to the extent that jurisdiction is affirmed, Argentine law to the determination of the concept of "asset" in Article 1(a) of the Argentina-U.K. BIT;

c) to the extent that jurisdiction is affirmed, the Argentina-U.K. BIT and such other relevant principles of international law as may have been relied upon by the Parties.

103. In addition, the Tribunal will be mindful of the Argentine Regulatory Framework for the transportation and distribution of natural gas, as it was presented to foreign investors at the time of the privatization of *Gas del Estado* and as subsequently modified by Argentina.

VI. Jurisdiction and Admissibility

104. Argentina raised objections to the jurisdiction of this Tribunal and to the admissibility of BG's claims.

105. The Tribunal will address Argentina's objections in the following order:

a) Is BG an "Investor"?

b) Has BG made an "Investment" in Argentina?

c) Are BG's claims admissible?

d) Is the dispute contractual?

e) May BG bring "derivative claims"?

f) Are measures of general application actionable under the Argentina-U.K. BIT?

g) Is the renegotiation process an obstacle to this Tribunal's jurisdiction?

106. Respondent's allegation that Argentine courts have exclusive jurisdiction over this dispute is related with questions (d) and (e) above, and it will be adjudicated in Section E below.

A. Is BG an "Investor"?

107. BG relies on Section 1(c)(i)(bb) of the definition of "Investor" in the Argentina-U.K. BIT:

"investor" means:

(i) in respect of the United Kingdom:

. . .

> (bb) companies, corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 12.

108. It is not disputed that BG is a company incorporated and constituted under the laws in force in the United Kingdom. A copy of BG's Certificate of Incorporation, Memorandum and Articles of Association are on the record.[103]

109. BG therefore qualifies as an "Investor" under the Argentina-U.K. BIT.

110. The Tribunal now turns to the question of whether BG made an "Investment" in Argentina within the terms of the Argentina-U.K. BIT.

B. Has BG Made an "Investment" in Argentina?

111. Article 1 of the Argentina-U.K. BIT includes the following definition of "Investment":

> (a) "investment" means every kind of asset defined in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made and admitted in accordance

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103. Exhibit J-188.

with this Agreement and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) shares in and stock and debentures of a company and any other form of participation in a company, established in the territory of either of the Contracting Parties;

(iii) claims to money which are directly related to a specific investment or to any performance under contract having a financial value;

(iv) intellectual property rights, goodwill, technical processes and know-how;

(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

A change in the form in which assets are invested does not affect their character as investments. The term "investment" includes all investments, whether made before or after the date of entry into force of this Agreement, but the provisions of this Agreement shall not apply to any dispute

concerning an investment which arose, or any claim concerning an investment which was settled, before its entry into force;

(b) "returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees.

112. BG contends that it holds the following "Investments" in Argentina:

a) an indirect participation in the Argentine companies MetroGAS (45.11%)[104] and GASA (54.67%);[105]

[Article 1(a)(ii) of the BIT]

b) the following rights over the economic value of the License,[106]

(i) claims to money and performance under contracts entered into by MetroGAS, and

(ii) benefits from the License granted to

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104. Held by BG International (i) directly (6.84%), and (ii) through its 54.67% interest in GASA (*i.e.*, 38.27%).

105. Held by BG International. Statement of Claim (paragraph 48) and Post-Hearing Brief (paragraph 169(a)).

106. Statement of Claim (paragraph 50) and Post-Hearing Brief (paragraph 169(b)).

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MetroGAS to carry out gas distribution services in Argentina;

[Article 1(a)(iii) and (v) of the BIT]

c) rights that the MetroGAS License be respected.[107]

[Article 1(a)(v) of the BIT]

113. Initially, Argentina argued that BG had not provided sufficient evidence of its ownership interest in GASA and MetroGAS.[108] In response, BG provided additional explanation and evidence of this participation.[109] Testimony at the hearing further established that BG's interest in GASA and MetroGAS is no longer contested.[110] Additionally, Argentina has not subsequently denied that BG's ownership interest in GASA and MetroGAS are an "Investment" within the meaning of Article 1(a)(ii) of the Argentina-U.K. BIT. On the contrary, Argentina's *Alegato Final* acknowledged that "... *BG tiene una única inversión: sus acciones.*"[111]

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107. Statement of Claim (paragraph 50) and Post-Hearing Brief (paragraph 169(c)).

108. *Memorial sobre Excepción de Incompetencia del Tribunal Arbitral*, pp. 45-52.

109. Counter-Memorial on Jurisdiction, paragraphs 42-58.

110. Testimony of Messrs. Petrecolla and Molina (Tr. Molina, 12 July 2006, 1587:5-1587:18).

111. Paragraph 185.

114. Argentina does, however, argue that shareholders may only bring claims with respect to measures taken by Argentina that directly interfere with their corporate rights. The thread of this argument runs across a number of Argentina's jurisdictional objections and the Tribunal believes that it is best addressed when it turns to the issue of "derivative claims" in Section E.

115. For now, the Tribunal will focus on whether the rights identified in Paragraphs 112(b) and (c) above constitute an "Investment" for purposes of the Argentina-U.K. BIT. A determination on this point requires consideration of Argentina's contentions that:

a) the definition of "Investment" in the BIT requires that the term "asset" be defined by reference to ". . . *the laws and regulations of the Contracting Party in whose territory the investment is made*"; and

b) the Spanish version of the BIT (*títulos de crédito*) prevails with respect to the meaning of the term "claims to money" in Article 1(a)(iii).[112]

1. "Asset" or "*Activo*"

116. Argentina relied heavily on the reference in Article 1(a) of the BIT to ". . . *the laws and regulations of the*

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112. The term used in the Spanish version of the BIT is "*títulos de crédito*".

Contracting Party in whose territory the investment is made". More specifically, Argentina asserts that:

a) the term "asset" in Article 1(a) of the BIT should be defined by reference to the laws of Argentina;

b) the Spanish version of the treaty (". . . *el término 'inversión' designa todo elemento del activo* . . .") requires construing the term "*activo*" as it is understood in generally accepted accounting principles; and

c) because MetroGAS has not included the MetroGAS License as an "*activo*" in its accounting, rights under the License are not an asset under the definition of "Investment" of the BIT.

117. As to the first point, BG conceded that Argentine law governs the issue of ". . . *whether a particular asset exists and in whom it vests.*"[113] The Tribunal agrees with both Parties: the *renvoi* of Article 1(a) of the treaty requires this Tribunal to apply the laws of Argentina to the interpretation of this part of the definition of "Investment" in the Argentina- U.K. BIT. As a matter of conventional international law, this *demarche* is necessary to determine whether rights associated with the MetroGAS License are protected under the BIT.

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113. "Responses to the Questions of the Arbitral Tribunal of 10 July 2006", p. 3.

118. A first conclusion emerges from Argentine law. The existence of the MetroGAS License and certain rights associated with it is unquestionable. The Regulatory Framework presented to international investors in order to promote interest in the privatization of *Gas del Estado* is determinative of this issue. This is not a finding as to the precise content of those rights, or as to BG's *ius standi* to exercise them – the award will deal with this issue later - but merely as to whether those assets were in existence as a matter of Argentine law. Argentina has taken a position with respect to the content, ownership and survival of those rights, but it has not denied their existence.[114]

119. The next question is whether Claimant's rights under the Regulatory Framework described in Chapter III.B of this award, including the MetroGAS License, constitute an "*activo*" pursuant to the definition of "Investment" in the Spanish version of the BIT, or an "asset" as set out in Article 1(a) of the English language version of the treaty.

120. Neither Party offered a definition of "*activo*"[115]

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114. For this reason alone, Respondent's reliance on Exhibit JL-490 (*Encana Corporation v. The Republic of Ecuador*, Award of 3 February 2006) is misplaced . This matter is inapposite to this case.

115. At the hearing, BG asserted that "*activo*" under Argentine law means "*. . . todo derecho, sea de carácter real o personal susceptible de valor patrimonial.*" It did not, however, provide any legal cite as the source of this definition and it is thus of limited assistance to the Tribunal's investigation of Argentine law ("Responses to the Questions of the Arbitral Tribunal of 10 July 2006", p. 3).

under any Argentine law of general application. In the absence of a statutory definition, the Tribunal must turn to the interpretive work of the courts.

121. In *Industria Mecánica S.A. v. Gas del Estado* (*Industria Mecánica*) the court took an ample patrimonial view of the constitutional protection of property rights:[116]

> [S]*egún la jurisprudencia de esta Corte, el término propiedad empleado en los artículos 14 y 17 de la Constitución Nacional ampara todo el patrimonio incluyendo derechos reales y personales, bienes materiales e inmateriales, [. . .] y en general todos los intereses apreciables que un hombre pueda poseer fuera de sí mismo, su vida y libertad, entre ellos los derechos emergentes de los contratos.*
>
> [Emphasis added]

122. Almost 20 years earlier, in *Compañía de Tranvías Anglo Argentina v. Nación Argentina* (*Compañía de Tranvías*), in a situation where certain measures had disturbed the economics of a concession, the Supreme Court focused on damage to the investor's patrimony as a whole:[117]

> [*las*] *normas tuvieron por consecuencia determinar mayores erogaciones para el concesionario;*

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116. Exhibit JL-154, pp. 859-860.

117. Exhibit J-14.

> *lo cual justificaba indemnización o aumento de tarifas. No debe olvidarse . . . que quien así legislaba era a su vez poder concedente y como tal, tenía la obligación de respetar la economía general del contrato, es decir su ecuación económico financiera.*

123. The property rights protected by the courts in Argentina are not limited to assets registered for accounting purposes, as the Spanish term "*activo*" might suggest. This conclusion is not altered by Argentina's reliance on the contractual definition of "*Activos Afectados al Servicio*" and "*Activos Esenciales*" set out in Section 1.1 of the Share Transfer Agreement.[118] First, this contract does not trump the broader notion of property embraced by *Compañía de Tranvías* and *Industria Mecánica S.A.* Second, the Share Transfer Agreement itself acknowledges that transfer of the physical assets did not entitle MetroGAS to engage in the distribution of gas, as the holding of a license is mandatorily required for that purpose.[119]

124. While Argentina was critical of reliance on the *Tranvías* case in a different context,[120] its criticism confirms the need to focus on property rights. For instance,

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118. Exhibit J-115.

119. For instance, clauses 4.3(g), 4.4(d) and 6.1(i) (Exhibit J-115).

120. Paragraphs 159 to 167 of the *Alegato Final* set out Argentina's position with respect to this case in the context of its allegations of *force majeure* and *imprevisión* under Argentine law.

in its *Alegato Final* Respondent argued that Argentina's offer to renegotiate constitutes an acknowledgement of the investor's property rights.[121] Recognition of these rights was not contingent on their registration as an "*activo*" in the books of MetroGAS.

125. Under the circumstances, the Tribunal finds no support for the contention that property rights are an "asset" only to the extent that they are listed as an "*activo*" for accounting purposes in a company's books. There is no question that MetroGAS received, in terms of value, something more than the physical assets inventoried in the Share Transfer Agreement. MetroGAS was granted a license and other statutory rights without which the physical assets could not have been put to use. In fact, the MetroGAS License was to enter into force on the very same day as the transfer of the physical assets.[122]

126. Interpreted in the light of Argentine jurisprudence, the term "*activo*" in Article 1(a) of the Spanish language Argentina-U.K. BIT is not semantically different from the concept of "asset" employed in the English version. Thus construed, both terms are broader than the accounting reading advocated by Argentina and hereby rejected by the Tribunal.

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121. "*No hay afectación sustancial del derecho de propiedad en la medida que existe un reconocimiento de ese derecho a través del proceso de renegociación, y una voluntad de Argentina de readecuar el contrato . . .*" (*Alegato Final*, paragraph 166(d)).

122. Clause 4.2.2 of the Share Transfer Agreement (Exhibit J-115).

127. The Tribunal consequently finds that the rights conferred under the Regulatory Framework described in Chapter III.B of this award, including under the MetroGAS License, come under the term "*activo*" and "asset" in the definition of "Investment" set out in Article 1(a) of respectively the Spanish and English versions of the BIT.

2. "Claims to Money" – "*Títulos de Crédito*"

128. Argentina also pointed to a discrepancy between the two authentic language versions of Article 1(a)(iii) of the Argentina-U.K. BIT.[123]

Spanish Version	**English Version**
(iii) títulos de crédito directamente relacionados con una inversión específica y todo otro derecho a una prestación contractual que tenga un valor financiero.	(iii) claims to money which are directly related to a specific investment or to any performance under contract having a financial value.

129. Respondent conceded that the laws and regulations of Argentina do not provide a definition of *título de crédito*.[124] Argentina, nonetheless, drew the Tribunal's

123. The signature page of the BIT indicates that the treaty was done "*. . . in two originals . . . in the English and Spanish languages, both texts being equally authoritative.*"

124. *Alegato Final*, paragraph 181.

attention to the narrow legal meaning of the term according to many legal scholars:[125]

> *. . . el documento escrito, firmado, nominativo, a la orden o al portador, que menciona la promesa unilateral de pago de una suma de dinero o de una cantidad de mercadería, con vencimiento determinado o determinable; o de consignación de mercaderías o de títulos especificados y que socialmente sea considerado como destinado a la circulación.*

130. For Argentina, Article 1(a)(iii) of the BIT only extends protection to investors where their "Investment" takes the form of a "*título de crédito*" (*i.e.*, a "negotiable instrument"). Conversely, BG believes that the English term "claims to money" is broader in scope and includes claims to money under contracts entered into by MetroGAS. Simply put, the divergence of the Spanish "*título de crédito*" and the English "claims to money" is semantically irreconcilable.

131. The Tribunal's analysis therefore begins with Article 33 of the Vienna Convention on the Law of Treaties (the Vienna Convention), which specifically addresses the interpretation of multilingual treaties:[126]

> 1. When a treaty has been authenticated in two or

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125. Argentina did not identify the legal scholars or the source of this definition.

126. Exhibit JL-103.

more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of a treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

132. The presumption of Paragraph 3 is rebuttable where, like here, the difference in meaning is not removed

by reference to Articles 31[127] and 32.[128] Paragraph 3 of

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127. "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

128. "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning

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Article 33 directs the interpreter to consider the object and purpose of the treaty.

133. The United Kingdom and Argentina introduced their BIT with the following paragraphs:

> The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina;
>
> Desiring to create favourable conditions for greater investment by investors of one State in the territory of the other State;
>
> Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States;
>
> Have agreed as follows . . .

134. Adoption of the Spanish term of the BIT as advocated by Argentina would considerably restrict the coverage of the treaty, discourage "greater investment"

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resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

a) leaves the meaning ambiguous or obscure; or

b) leads to a result which is manifestly absurd or unreasonable."

and defeat the shared aspiration expressed by Argentina and the U.K. in executing this instrument in 1993.

135. The Tribunal is also persuaded by Argentina's expression of its own understanding of the treaty prior to this dispute. As recalled earlier, Decree 669/00 expressly acknowledges that investors in the privatization of Gas del Estado would be entitled to protection under ". . . *Tratados de Protección Recíproca de Inversiones* . . ." entered into by Argentina.[129] It was clear at the time that BG's investment in MetroGAS would not take the form of "*títulos de crédito*" as this term is now understood by Argentina.

136. Likewise, Resolution 308/02[130] and Decree 1090/02[131] excluded from the renegotiation process any licensee seeking to enforce the rights under its license through an investment arbitration. It is difficult to understand why Respondent would seek to prohibit investment arbitration, if the underlying rights sought to be enforced do not qualify as an "Investment", as now argued by Argentina.

137. For these reasons, the Tribunal adopts the English text of Article 1(a)(iii) of the Argentina-U.K. BIT for purposes of this award.[132]

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129. Exhibit J-226, p. 2.

130. Article 11 (Exhibit J-347).

131. Article 1 (Exhibit J-334).

132. Conventional international law provides further confirmation of this finding. "Claims to money" are an

3. Conclusion

138. The Tribunal finds that BG's ownership interest as described in Paragraph 112(a) of this award is an "Investment" for the purposes of Article 1(a)(ii) of the Argentina-U.K. BIT.

139. The Tribunal also finds that "*claims to money which are directly related to a specific investment or to any performance under contract having a financial value*" squarely fall within the definition of "Investment" of the BIT. Nonetheless, as noted in Paragraph 118, the survival and precise content of those rights, and BG's standing to exercise them, will be taken up by the Tribunal in Sections D and E below.

C. Are BG's Claims Admissible?

140. The Argentina-U.K. BIT provides that recourse to arbitration is possible only where disputes have been submitted for 18 months to the competent tribunal of the State which hosts the investment and: (i) the tribunal has not issued a final decision; or (ii) the parties are still in dispute after the decision. To recall, the text of Article 8(1) and (2) provides:

> (1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other

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"investment" pursuant to Article 1(6)(c) of the Energy Charter Treaty (ECT). The ECT translation of the term into Spanish is "*créditos pecuniarios*".

Contracting Party, which have not been amicably settled shall be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.

(2) The aforementioned disputes shall be submitted to international arbitration in the following cases:

(a) if one of the Parties so requests, in any of the following circumstances:

(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;

(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;

(b) where the Contracting Party and the investor of the other Contracting Party have so agreed.

141. Argentina argued that failure by BG to bring its grievance to Argentine courts for 18 months renders its claims in this arbitration inadmissible. It is to be noted

that Article 8(1) of the BIT entitles Argentina to trigger domestic litigation of treaty disputes,[133] and there is no evidence on the record that Argentina even attempted to do so.

142. BG argued that this requirement is senseless as there is no chance that in a case of this nature a decision could ever be rendered within the eighteen-month period. BG further contended that the MFN clause of the Argentina-U.K. BIT[134] entitles BG to rely on the more favorable treatment extended by Argentina to US investors. The Argentina-U.S. Bilateral Investment Treaty does not require prior recourse to local courts for a period of 18 months. Finally, BG relied on the customary international law rule that the requirement of exhaustion of local remedies may be disregarded in cases where ". . . *the course of justice is unduly slow or unduly expensive*

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133. Article 8 provides that investment disputes under the BIT shall be submitted ". . . *at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.*"

134. Article 3: "(1) Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State. (2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third State."

in relation to the prospective compensation."[135]

143. Customary international law becomes relevant, but only as a point of departure for the Tribunal's analysis of the evolution of international investment law. Under traditional international law, mistreated investors did not have standing to sue the host State of their investment. Instead, they had to rely on their home State's willingness to espouse their claim by offering diplomatic protection. Diplomatic protection, in turn, would only give rise to international proceedings if local remedies were exhausted.[136]

144. Exhaustion of local remedies, however, is not an absolute bar to international adjudication. Article 15 of the International Law Commission Draft Articles on Diplomatic Protection attempts to codify the exceptions:

> Local remedies do not need to be exhausted where:
> (a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;
> (b) there is undue delay in the remedial process

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135. "State Responsibility", Report by Robert Ago, ILC Special Rapporteur, Yearbook of the ILC 1977, vol. II (Part Two, page 48, paragraph 50, footnote 204). Quoted by BG with approval in its Post- Hearing Brief, paragraph 185 (emphasis omitted).

136. The rule is ". . . *an important principle of customary international law* . . .". Exhibit JL-195 (*Case Concerning the Elettronica Sicula S.p.A. (United States of America v Italy)*, Judgment of20 July 1989, ICJ Reports 1989, *E.L.S.I.*).

which is attributable to the State alleged to be responsible; (c) there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury; (d) the injured person is manifestly precluded from pursuing local remedies; or (e) the State alleged to be responsible has waived the requirement that local remedies be exhausted.

145. The proliferation of bilateral investment treaties has effected a profound transformation of international investment law. Most significantly, under these instruments investors are entitled to seek enforcement of their treaty rights by directly bringing action against the State in whose territory they have invested. Investors may seek redress in arbitration without securing espousal of their claim or diplomatic protection. The Argentina-U.K. BIT is a paradigm of this evolution.

146. For the reasons mentioned above, BG's reliance on the exceptions to the customary international law rule of exhaustion of local remedies in this matter is difficult to accept. The Tribunal accepts Argentina's position that as a matter of treaty law investors acting under the Argentina-U.K. BIT must litigate in the host State's courts for 18 months before they can bring their claims to arbitration.

147. As a matter of treaty interpretation, however, Article 8(2)(a)(i) cannot be construed as an absolute impediment to arbitration. Where recourse to the domestic judiciary is unilaterally prevented or hindered by the host State, any such interpretation would lead to

the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention, allowing the State to unilaterally elude arbitration, which has been the engine of the transition from a politicized system of diplomatic protection to one of direct investor-State adjudication.

148. In this case, the regular operation of the courts in Argentina came under significant pressure after promulgation of the Emergency Law. Concerned with judicial decisions which might undermine the full implementation of emergency legislation, the administration of President Duhalde enacted Decree 214/02,[137] whose purpose was to bar recourse to the courts by those whose rights were felt to be violated:

> *. . . la preservación de la paz social como el necesario reordenamiento de las relaciones jurídicas, no se compadece con la masiva concurrencia a los tribunales de quienes procuran la resolución de sus pretensiones, cuando ellas son de imposible satisfacción, sin causar daño irreparable a la economía y al derecho de todos aquellos que no podrían ver satisfechos sus propios derechos de propiedad, de producirse el colapso final del sistema financiero.*

149. As a matter of policy, Decree 214/02 provided for a stay of all suits brought by those whose rights were allegedly affected by the emergency measures adopted by the government:

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137. Exhibit J-292.

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> *. . . corresponde disponer la suspensión temporaria de la tramitación de todos los procesos judiciales y medidas cautelares y ejecutorias en los que se demande o accione en razón de los créditos, deudas, obligaciones, depósitos o reprogramaciones financieras que pudieran considerarse afectados por las normas y disposiciones dictadas en el marco de la crisis y la emergencia.*

150. Article 12 is the operative provision which implements the stated policy objective:

> *. . . se suspende por el plazo de . . . (180) días el cumplimiento de las medidas cautelares en todos los procesos judiciales, en los que se demande o accione contra el Estado Nacional y/o las entidades integrantes del sistema financiero, en razón de los créditos, deudas, obligaciones, depósitos o reprogramaciones financieras que pudieran considerarse afectados por las disposiciones contenidas en el Decreto Nº 1570/01, en la [Ley de Emergencia], en el Decreto Nº 71/02, en el presente decreto, en el Decreto Nº 260/02, en las Resoluciones del MINISTERIO DE ECONOMIA y en las Circulares y demás disposiciones del BANCO CENTRAL DE LA REPUBLICA ARGENTINA dictadas en consecuencia y toda otra disposición referida a dicha normativa.*
>
> *Por el mismo lapso se suspende la ejecución de las sentencias dictadas con fundamento en dichas*

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normas contra el Estado Nacional, los Estados Provinciales, los Municipios o la CIUDAD AUTONOMA DE BUENOS AIRES, sus entidades autárquicas o descentralizadas o empresas o entes estatales, en todos los procesos judiciales referidos a dicha normativa.

151. The Tribunal notes that the Emergency Law remains in full force five years after its promulgation in 2002, and there is no indication on the record that its enforcement has been attenuated since its original promulgation.[138]

152. Decree 320/02[139] provides further insight into the intervention of the Executive Branch of government to prevent judicial adjudication and enforcement of property rights after the adoption of the Emergency Law. The introductory paragraphs of this decree, signed by President Duhalde on 15 February 2002, recall the State's authority to restrict the regular exercise of patrimonial rights,[140] and underscore that the policy objectives of the Emergency Law and its regulations may be defeated by

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138. Law 26,204 extended the application of the Emergency Law until 31 December 2007 (Exhibit J-740).

139. Exhibit J-298.

140. The eleventh *Considerando* of Decree 320/2002 (Exhibit J-298) relies on the Supreme Court precedent that extraordinary circumstances authorize the State to "... *restringir el ejercicio normal de algunos derechos patrimoniales tutelados por la Constitución* ...".

unfettered judicial challenge.[141]

153. It is not within the province of this Tribunal to pass judgment on the policy reasons prompting promulgation of Decrees 214/02 and 320/02, nor to question the sovereign prerogative in their adoption. However, it seems fitting to examine the reasonableness of the expectation that judicial remedies should have been exhausted at a time where the Executive Branch was seeking to prevent any judicial interference with the emergency legislation.

154. Later, in June and August of 2002, Argentina provided in Resolution 308/02[142] and Decree 1090/02[143] that any licensee seeking judicial redress would be excluded from the renegotiation process of its license. The relevant provisions in fact create an incentive for licensees not to go to the courts:

> Article 1 of Decree 1090/02
>
> *Los concesionarios que efectuaren reclamos por incumplimiento contractual fuera del proceso de renegociación . . . quedarán automáticamente excluidos de dicho proceso.*

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141. This is the legislative intent expressed in the *Considerandos* of Decree 320/02 (Exhibit J-298).

142. Exhibit J-347.

143. Exhibit J-334.

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Article 11 of Resolution 308/02

Las empresas concesionarias o licenciatarias que mientras se desarrolle el proceso de renegociación en curso, efectuaren una presentación en sede judicial o ante un tribunal arbitral, articulada sobre el presunto incumplimiento contractual fundado en las normas dictadas en razón de la emergencia, serán intimadas por el MINISTERIO DE ECONOMIA, como Autoridad de Aplicación del régimen dispuesto por el Decreto 293/02, a desistir de tal acción, bajo apercibimiento de que si no lo hicieran, se instarán los actos para disponer su exclusión de dicho proceso.

155. Argentina took the position in this arbitration that, had BG brought its grievance to domestic courts, Argentina would have collaborated to promote achievement of a prompt final judgment.[144] The Tribunal must assume this to be true under normal circumstances. However, the Tribunal is also persuaded that under the dire circumstances surrounding the emergency measures, the Executive Branch sought to prevent the collapse of the financial system by (i) directly interfering with the normal operation of its courts, and (ii) by excluding litigious licensees from the renegotiation process.

156. The Tribunal has given due consideration to Minister Rosatti's opinion that it would take Argentine courts more than six years to reach a decision in a case

144. *Alegato Final*, paragraph 234.

like this.[145] Yet, this opinion is not central to the Tribunal's finding on this issue. Rather, the Tribunal notes that a serious problem would loom if admissibility of Claimant's claims were denied thus allowing Respondent at the same time to:

a) restrict the effectiveness of domestic judicial remedies as a means to achieve the full implementation of the Emergency Law and its regulations;

b) insist that Claimant go to domestic courts to challenge the very same measures; and

c) exclude from the renegotiation process any licensee that does bring its grievance to local courts.

157. The Tribunal consequently finds admissible the claims brought by BG in this arbitration, thus rendering unnecessary the examination of the relevance of Article 3 of the BIT (Most Favored Nation) to determine whether Claimant should have sought relief by the courts of Argentina during at least a period of 18 months before resorting to arbitration.

D. Is the Dispute Contractual?

158. Article 8(2) of the BIT provides for arbitration of

145. Exhibit J-439.

certain investment disputes. Argentina argued that:[146]

a) Argentina did not assume any commitment with respect to BG;[147]

b) the dispute submitted to arbitration by BG is not a "dispute with regard to an investment" within the terms of the treaty;

c) BG's claim is contractual in nature; and

d) a claim for expropriation requires "something more" than a breach of contract.

159. The Tribunal's focus for the moment concerns jurisdiction only and thus Argentina's claim that there has been no expropriation will be addressed below in Chapter VII. Argentina's other objections fall into one of two categories: the existence or not of specific commitments (paragraph 158(a) above) and the nature of BG's claim (paragraph 158(b) and (c) supra). The Tribunal now takes up these issues seriatim.

1. Specific Commitments

160. The privatization of the gas industry in Argentina during the 1989-1992 period and the ensuing Regulatory Framework were described earlier in Chapter III of

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146. *Memorial sobre Excepción de Incompetencia del Tribunal Arbitral*, pp. 19-28.

147. *Alegato Final*, paragraph 247.

this award. This Section of the award examines the representations directly or indirectly made by Argentina during that process.

161. As mentioned, the concept of *Gas del Estado*'s privatization originated in Law 23696 of 17 August 1989. Shortly thereafter, on 11 December 1990, Argentina and the United Kingdom executed their BIT.

162. As indicated earlier, under the Gas Law enacted on 20 May 1992 tariffs were to be "just and reasonable".[148] While the Gas Law is silent as to the currency for the calculation or expression of the tariffs, it does provide that:

a) prudent and efficient gas distributors would collect "*. . . ingresos suficientes para satisfacer todos los costos operativos razonables . . . impuestos, amortizaciones y una rentabilidad razonable . . .*";[149]

b) tariffs must be such that they provide for "*rentabilidad razonable*" (*i.e.*, a return commensurate to the return of other activities of equal or comparable risk);[150]

c) tariffs would be adjusted by reference to international market indicators;[151] and

148. Article 2(d).

149. Article 38(a).

150. Article 39.

151. Article 41.

d) tariffs would be subject to review every five years,[152] or on an extraordinary basis.[153]

163. The Bidding Rules, the Gas Decree and the MetroGAS License are more explicit about the currency for the calculation and expression of the tariffs.

164. Section 7.1 of Annex F of the Bidding Rules of 20 July 1992 provides that:[154]

> *Las tarifas están expresadas en pesos convertibles según la Ley 23,928 a la paridad de 1 = 1 con el dólar estadounidense. Las mismas . . . serán ajustadas inmediata y automáticamente en caso de variación de la paridad. A estos efectos se considerará la cantidad de moneda argentina necesaria para adquirir un dólar estadounidense en la plaza de Nueva York.*

165. Section 7.5 of the Bidding Rules permits tariff adjustment for inflation in accordance with US PPI:

> *La tarifa del Distribuidor . . . y la tarifa de transporte . . . serán [ajustadas] semestralmente . . . de acuerdo con la variación operada en el* índice *de precios al por mayor de productos industriales de los EE.UU. . . . según se establezca*

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152. Article 42.

153. Upon the request of the service provider (Article 46), or *ex officio* by ENARGAS (Article 47).

154. Exhibit J-100.

> *en la licencia correspondiente y los restantes requisitos que se establezcan en el Reglamento de Tarifas y Condiciones Generales del Servicio. La Autoridad Regulatoria establecerá el mecanismo para el ajuste.*

166. The Gas Decree of 18 September 1992 establishes that the US dollar is the currency for the calculation of transportation and distribution tariffs.

> *En la adecuación normal y periódica de la tarifas que autorice, [ENARGAS] se ajustará a los siguientes lineamientos:*
>
> *(1) Las tarifas de Transporte y Distribución se calcularán en Dólares.*[155] *El Cuadro Tarifario resultante será expresado en pesos convertibles según la Ley No. 23,928,*[156] *teniendo en cuenta para su reconversión a pesos la paridad establecida en el Artículo 3 del Decreto No. 2.128/91.*[157]

167. Further, Article 41(3) of the Gas Decree requires inclusion in the respective licenses of a tariff adjustment methodology based on international market indicators.

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155. Article 1(1) of the Gas Decree defines "*Dólar*" as "*. . . la moneda de curso legal en los Estados Unidos de América*".

156. The Convertibility Law (Exhibit J-79).

157. Article 3 of the *Decreto No. 2.128/91* (Exhibit J-86) establishes a 1 to 1 parity between the Argentine peso and the US dollar.

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168. Article 42 of the Gas Decree mandates ENARGAS to issue rules applicable to the review of tariffs every five years. The Gas Decree offers the following guidance to the regulator:

> (. . . .) *La revisión global del método empleado para el cálculo de las tarifas . . . se mantendrá por un nuevo período de Cinco (5) años contados a partir de su vigencia, procurando observar los principios de estabilidad, coherencia y previsibilidad tanto para los Consumidores como para los Prestadores.*
>
> *[ENARGAS] establecerá las normas de procedimiento para la revisión del método empleado en el cálculo de las tarifas que asegure la participación de los sujetos de la Ley.* (. . . .)

169. Article 46 of the Gas Decree applies to the extraordinary review of tariffs:

> *[ENARGAS] deberá establecer los requisitos que deberán cumplir los Transportistas, Distribuidores o consumidores en sus solicitudes de modificación de Tarifas o del Reglamento del Servicio a fin de acreditar la necesidad de tales modificaciones.*
>
> *Las modificaciones contempladas en el Artículo 46 de la Ley deberán basarse en circunstancias específicas no previstas con anterioridad, y no podrán ser recurrentes. Las mismas no incluyen*

el reajuste que contempla el Artículo 42 de la Ley.
(. . . .)

170. Article 4.5 provides reassurance to licensees that their license may not be modified without their consent:

> (. . . .) *Las licencias otorgadas no . . . serán modificadas durante su vigencia sin el consentimiento de los licenciatarios. No se considerarán modificaciones a la licencia (i) las modificaciones que [ENARGAS] introduzca en el Reglamento del Servicio, sin perjuicio del derecho de [ENARGAS]o del licenciatario a requerir el correspondiente ajuste de las tarifas si el efecto neto de tal modificación* alterase *en sentido favorable o desfavorable, respectivamente, el equilibrio económico-financiero existente antes de tal modificación; y (ii) los reajustes de la tarifa que conste[n] como anexo de la licencia y que se practiquen de acuerdo con la Ley, esta Reglamentación y los términos de la respectiva licencia. Al convocar a licitación en caso de extinción de una licencia, [ENARGAS] podrá modificar los términos de la licencia vigente hasta ese momento.*

171. The Information Memorandum of September 1992 was circulated to raise interest in the privatization of *Gas del Estado* among foreign investors.[158] This Memorandum

158. Exhibit J-101.

touted the availability of real dollar tariffs:[159]

> The privatisation of Gas del Estado offers an unique investment opportunity. Outlined below are some of the attractive characteristics of the privatisation.
>
> (. . . .)
>
> **Attractive tariffs, in real dollar terms.** [Emphasis in the original] The initial tariffs have been set at a level intended to provide the new companies with an attractive return on investment, including the investment necessary to renovate the systems. The tariff regulation, which is based on the U.K. style of price capping formula, allows the new companies to maintain the real dollar value of their tariffs and provides incentives to invest in improving efficiency.
>
> [Emphasis added.]

172. The Information Memorandum draws attention to the tariff and adjustment regimes of the Gas Law and of the Gas Decree:[160]

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159. Exhibit J-101, p. 8. Appendix A (p. A-9) further confirms that "*[t]ariffs will be calculated in dollars but expressed in convertible Pesos.*"

160. Exhibit J-101, pp. 26 and 27. These principles are restated in Appendix A of the Information Memorandum.

Appendix D

The Gas [Law] provides that:

- tariffs should be at a level which enables the licensee to earn a reasonable rate of return; and

- profitability should reflect the efficiency of the licensee and satisfactory performance of the licensed service.

The Gas [Law] specifies also that Licensees shall adjust tariffs in accordance with a mechanism which refers to appropriate international market indicators, modified by a factor intended to promote efficiency while providing the licensee with an incentive to invest in the system. The adjustment mechanism shall be reviewed every five years by the NGRE, taking account of the two principles stated above. This mechanism has been adopted in a number of other major utilities internationally and is described as "price capping with periodic regulatory review" (also commonly known as "RPI-X").

(. . . .)

The Regulatory Decree sets out the principles of tariff regulation and the licence contains the detailed adjustment formula. The tariffs and prices are calculated in U.S. dollars and expressed in convertible Argentine pesos as provided in the Convertibility Law (No. 23,928 and its Decree No. 2128/91). The allowed adjustments will also be

calculated in U.S. dollars.

Licensees may adjust their tariffs semi-annually to reflect changes in the U.S. Producer Price Index (PPI), which will be used as the market indicator mentioned in the Gas [Law] (. . . .)

173. MetroGAS received its 35 year License on 21 December 1992. The MetroGAS License:

a) confirms the application of the US dollar as the currency of reference for the calculation and adjustment of tariffs (Article 9.2);

b) Annex III includes an indication that tariffs are expressed *"en $ convertibles ley 23,928"*[161] (Annex III);

c) sets out the different tariff review and adjustment mechanisms (Articles 9.3, 9.4 and 9.6);

d) requires that modifications to the *Reglamento de Servicio* respond to the evolution and need to improve service, and it calls for consultations with the licensee and a tariff adjustment if the economic and financial equilibrium is disturbed (Article 9.1);

e) requires the consent of the licensee to modify

161. Law 23.928 is the Convertibility Law.

the *Reglas Básicas* of the License (Article 18.2); and

f) prohibits price controls and entitles the licensee to compensation in case of departure from this rule (Article 9.8).

174. Finally, on 28 December 1992, GASA, the Initial Shareholders, MetroGAS, the *Estado Nacional* and *Gas del Estado* entered into a Share Transfer Agreement.[162] Clause 4.2.2 of this agrerement provides for the entry into force of the MetroGAS License.

* * *

175. The genesis of Argentina's privatization of *Gas del Estado* and the representations made to foreign investors at every step of the process are irreconcilable with Respondent's defense. While formally the Regulatory Framework and the MetroGAS License apply to MetroGAS, the record unequivocally shows that the entire privatization process was designed to invite the participation of foreign investors. How the investment is structured is frequently a function of regulatory requirements or fiscal considerations. This, however, does not remove the focus from foreign investors as the main target of Argentina's privatization efforts.

176. It is also difficult to square the investment protection paradigm offered by the Argentina-U.K.

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162. Exhibit J-115.

BIT with Argentina's position that its commitments are to MetroGAS alone. BG is entitled to rely on these commitments in connection with its allegations of breach of the substantive provisions of the BIT with respect to its "Investment" in Argentina. But this is a matter for Section E below.

2. Nature of BG's Claims

177. Under Article 8 of the Argentina-U.K. BIT, treaty disputes with regard to an "Investment" may be submitted to arbitration.

178. As already noted, BG contended that its "Investment" for purposes of the Argentina-U.K. BIT takes the form of (i) an indirect ownership interest in GASA and MetroGAS; and (ii) certain rights. BG's Statement of Claim describes the "Investment" as follows:[163]

> 49. Since article 1(a)(ii) of the UK Treaty defines investment as *inter alia* "shares in stock" and "any other form of participation in a company, established in the territory of either of the Contracting Parties", BG's participations in the Argentine companies MetroGAS and GASA constitute protected investments under the U.K. Treaty.
>
> 50. Moreover, BG has (i) interests in claims to money and performance under contracts entered

163. Statement of Claim, paragraphs 49 and 50

into by MetroGAS; and (ii) benefits from the Licence granted by the Government to MetroGAS to carry out gas distribution services in Argentina. These also constitute protected investments under Article 1(a)(iii) and (v) of the UK Treaty.

179. BG has thus submitted to arbitration a dispute relating to damage to such ownership interest and rights. This is, according to BG, the dispute "*with regard to an investment*" in the instant matter. BG argued that Argentina breached the BIT with respect to the following "Investments":

a) BG's indirect equity in MetroGAS and GASA (Article 1(a)(ii) of the BIT); and

b) BG's rights under Article 1(a)(iii) and (v) of the Argentina-U.K. BIT.

180. Argentina has objected to this Tribunal's jurisdiction on grounds that Argentina has not consented to the arbitration of this dispute:[164]

60 Observe el Tribunal que el desacuerdo planteado en el caso sub examine está referido a las disposiciones contenidas en una licencia otorgada para la distribución de gas natural y en el marco regulatorio respectivo. Tales desacuerdos no están vinculados con la única inversión realizada por

164. *Memorial sobre Excepción de Incompetencia del Tribunal Arbitral*, p. 23.

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BG y en consecuencia no habilitan la jurisdicción arbitral de conformidad con el artículo 8 del TBI. Las alegadas disputas jurídicas que puedan surgir de dicha licencia e instrumentos deberán ser sometidas, conforme se explica infra, a la jurisdicción de tribunales nacionales libremente consentidas por las partes correspondientes. La República Argentina no niega que los contratos puedan constituir inversiones protegidas. Para protegerlos, simplemente, se requiere que los contratos pertenezcan al inversor, lo que aquí no ocurre.

61 Conforme lo expresa LA DEMANDANTE en el párrafo 389 de la Demanda, todos los compromisos que supuestamente la República Argentina habría violentado surgen directamente de la licencia y de instrumentos que forman el marco regulatorio del gas. Por ello, debieron ser planteados en el foro pactado, que no es un tribunal del CNUDMI. LA DEMANDANTE, consciente de la prorroga de jurisdicción que libremente había pactado Metrogas, intenta confundir al Tribunal sobre la real naturaleza de sus reclamos.

181. The fact that claims under a treaty may relate to underlying rights set out in domestic law, or in a concession, license or contract is not, in and of itself, an impediment to adjudication in the treaty forum. The Tribunal finds persuasive support for this proposition in other investment arbitration awards relied upon by

Claimant.[165] The Tribunal refers in particular to the Annulment Committee findings in *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic*:[166]

> . . . where 'the fundamental basis of a claim' is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in the contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard. At most, it might be relevant – as municipal law will often be relevant – in assessing whether there has been a breach of the treaty.

182. In *Eureko v. Poland* the tribunal followed the *Vivendi Annulment Committee* decision in upholding its authority to ". . . *consider whether the acts of which Eureko complains, whether or not also breaches of*

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165. Exhibit JL-427 (*Enron Corp & Ponderosa Assets LP v Argentine Republic*, ICSID Case No ARB/01/3, Decision on Jurisdiction, 14 January 2004, paragraphs 91 and 93); Exhibit JL-495 (*Azurix Corp. v The Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006, paragraph 76); Exhibit JL- 435 (*Siemens AG v The Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004, paragraphs 180-183).

166. Exhibit JL-371 (*Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2002, paragraph 101).

[contract], *constitute breaches of the treaty*".[167]

183. The Tribunal therefore has jurisdiction to determine if the measures complained of by Claimant constitute a breach of the treaty with respect to "Investments" made by BG, regardless of whether or not the same measures are in breach of the MetroGAS License.

184. Still, BG's claims are properly before this Tribunal only to the extent that BG has standing to bring them. In other words, the question is whether BG is entitled to claim that Argentina has breached the Argentina-U.K. BIT with respect to its "Investments" as follows:

a) BG's indirect equity in MetroGAS and GASA (Article 1(a)(ii) of the BIT); and

b) BG's alleged rights under Article 1(a)(iii) and (v) of the Argentina-U.K. BIT.

185. The next Section of this award examines the issue of derivative claims.

E. May BG Bring "Derivative Claims"?

186. BG argued that Argentina breached the Argentina-U.K. BIT with respect to the following BG "Investments":

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167. Exhibit JL-471 (*Eureko B.V. v Republic of Poland*, ad hoc arbitration, Partial Award, 19 August 2005).

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a) BG's indirect equity in MetroGAS and GASA (Article 1(a)(ii) of the BIT); and

b) BG's rights under Article 1(a)(iii) and (v) of the Argentina-U.K. BIT.

187. The Tribunal will thus examine the derivative nature of BG's treaty claims with respect to equity (Article 1(a)(ii) of the BIT) and with respect to "Investments" that take the form set out in Article 1(a)(iii) and (v) of the BIT.

1. Article 1(a)(ii) of the BIT

188. Paragraph 113 of this award records Argentina's acknowledgement that BG holds an indirect shareholding interest in GASA and in MetroGAS. This interest falls squarely within the definition of "Investment" in Article 1(a)(ii) of the BIT.[168]

189. In responding to specific Tribunal questions, BG argued that Argentina dismantled the tariff regime applicable to MetroGAS and destroyed the promised economic equilibrium. This, in turn, allegedly abolished its rights to:[169]

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168. "['I]nvestment' means every kind of asset defined in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made and admitted in accordance with this Agreement and in particular, though not exclusively, includes: . . . (ii) shares in and stock and debentures of a company and any other form of participation in a company, established in the territory of either of the Contracting Parties; . . .".

169. Post-Hearing Brief, paragraph 245.

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a) ". . . tariffs sufficient for [MetroGAS] to pay back interest and capital on its debt to third parties . . ."; and

b) ". . . recover the value of its equity stake (all of the sums spent in MetroGAS on acquiring its shareholding and in growing the business through reinvested income), and a reasonable rate of return on those amounts . . ."

190. Thus articulated, BG's claims are derivative. BG does not claim that Argentina's measures were specifically directed against its shareholding in GASA and MetroGAS. BG claims instead that damage to the value of its shares was caused by (or derives from) measures adopted by Argentina which had a negative impact on the activities of MetroGAS and, hence, on the value of its shareholding in GASA and in MetroGAS.

191. Argentina objected to the jurisdiction of this Tribunal on grounds that derivative claims are proscribed by international law and by domestic corporate law.

192. In support for its position under international law, Argentina initially relied on *Barcelona Traction, Light and Power Co Ltd*,[170] and it later invoked other more recent

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170. *Memorial sobre Excepción de Incompetencia del Tribunal Arbitral*, pp. 84 *et s.*. Exhibit JL-111 (*Barcelona Traction, Light and Power Co Ltd., Belgium v Spain*, Judgment 5 February 1970, ICJ Reports 1970).

decisions, including *GAMI v Mexico*.[171]

193. The Tribunal finds the *GAMI* decision apposite and compelling as it relates generally to derivative claims, and specifically to the significance of *Barcelona Traction*.

194. GAMI, a U.S. investor, owned 14.18% of a Mexican company (GAM) in the business of producing sugar. GAM owned 5 sugar mills which were formally expropriated by the Mexican government in September of 2001.

195. Mexico did not expropriate GAM, nor did it formally seize GAMI's shares in GAM. GAMI's argument was that the formal expropriation of the sugar mills rendered its shares worthless because the mills were GAM's only productive asset.

196. The *GAMI* tribunal framed the issue of derivative shareholder claims as follows:[172]

> The disputing Parties have devoted considerable efforts to the issue whether GAMI is entitled to claim on account of its derivative prejudice as a shareholder. The heart of this debate is whether governmental acts or omissions that adversely

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171. *Alegato Final*, paragraph 266. Exhibit JL-447 (*GAMI Investments Inc. v. The United Mexican States*, UNCITRAL / NAFTA, Final Award of 15 November 2004).

172. Exhibit JL-447 (*GAMI Investments Inc. v. The United Mexican States*, (*GAMI*), UNCITRAL /NAFTA, Final Award of 15 November 2004, paragraph 27).

affect GAM may be pleaded as breaches of NAFTA because they had the result of reducing the value of GAMI's stake in GAM.

197. The tribunal found that "[c]*hapter 11* [of the NAFTA] *does not require a claimant shareholder to be a majority or controlling owner for his investment to qualify for protection.*"[173] In its submission to the *GAMI* tribunal, the United States acknowledged that investors like GAMI were entitled to bring action under the North American Free Trade Agreement (NAFTA) on their own behalf. However, the United States argued that they may only do so with respect to damage to their own interest, and not for injuries to the corporation. Both Mexico and the United States relied on *Barcelona Traction* in support for this proposition.[174] The Tribunal disagreed:[175]

> The Tribunal . . . does not accept that *Barcelona Traction* established a rule that must be extended beyond the issue of the right of espousal by diplomatic protection. The ICJ itself accepted in *E.L.S.I.* [footnote omitted] that US shareholders of an Italian corporate entity could seise the international jurisdiction when seeking to hold Italy liable for alleged violation of a treaty by way of measures *imposed on that entity.*

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173. *Id*, paragraph 28.

174. *Id*, paragraph 29.

175. *Id*, paragraph 30.

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198. The *GAMI* tribunal found support for its findings in *Goetz v Burundi*:[176]

> *Le Tribunal observe que la jurisprudence antérieure du CIRDU ne limite pas la qualité pour agir aux seules personnes morales directement visées par les mesures litigieuses mais l'étend aux actionnaires de ces personnes, qui sont les véritables investisseurs.*

199. Like the *GAMI* tribunal, this Tribunal relied on *Vivendi* for a more explicit confirmation of the legitimacy of derivative shareholder claims:[177]

> . . . it cannot be argued that CGE did not have an "investment" in CAA from the date of conclusion of the Concession Contract, or that it was not an "investor" in respect of its own shareholding, whether or not it had overall control of CAA. Whatever the extent of its investment may have been, it was entitled to invoke the BIT in respect of conduct alleged to constitute a breach . . .

200. The conclusion of the tribunal's reasoning in *GAMI*

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176. Exhibit JL-289 (*Antoine Goetz et consorts v République du Burundi*, ICSID Case No ARB/95/3, Award 2 September 1998, 15 *ICSID Review – Foreign Investment Law Journal* 457).

177. Exhibit JL-371 (*Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2002, paragraph 50).

is directly on point to the instant dispute:[178]

> . . . The fact that a host state does not explicitly interfere with share ownership is not decisive. The issue is rather whether a breach of NAFTA leads with sufficient directness to loss or damage in respect of a given investment. Whether GAM can establish such a prejudice is a matter to be examined on the merits. Uncertainty in this regard is not an obstacle to jurisdiction.

201. The Tribunal finds that no authority on the record, including *Consortium Groupement L.E.S.I. DIPENTA v. Algeria*,[179] leads to a different conclusion or presents an interpretation of *Barcelona Traction* that is inconsistent with the findings in *GAMI*.

202. But *Barcelona Traction* is inapposite to this case for other reasons as well:

a) the case does not stand for what Argentina purports - the central legal principle decided in *Barcelona Traction* is that the right of diplomatic protection of a corporate entity should be attributed to the State of incorporation, a point of law not at issue here;

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178. Exhibit JL-447 (*GAMI*, paragraph 33).

179. Exhibit JL-457 (*Consorzio Groupement L.E.S.I. – Dipenta v Algerian Democratic Republic*, ICSID Case No ARB/03/08, Award 10 January 2005).

b) the ICJ specifically stated that it was not deciding whether shareholders could bring a claim for losses to their interests, since the only claim made was for losses to the enterprise;[180] and

c) even if *Barcelona Traction* were somehow relevant to the case at hand, the agreement of Argentina and the U.K., as set out in the BIT would override an international decision from 1970.

203. Under the Argentina-U.K. BIT, BG is clearly an "Investor" and its shareholding interest in GASA and MetroGAS is undoubtedly an "Investment".

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180. The ICJ held: ". . . The Belgian Government claims that shareholders of Belgian nationality suffered damage in consequence of unlawful acts of the Spanish authorities and, in particular, that the Barcelona Traction shares, though they did not cease to exist, were emptied of all real economic content. It accordingly contends that the shareholders have an independent right to redress, notwithstanding the fact that the acts complained of were directed against the company as such. Thus the legal issue is reducible to the question of whether it is legitimate to identify an attack on company rights, resulting in damage to shareholders, with the violation of their direct rights . . . The Court has noted . . . that the Belgian Government did not base its claim on an infringement of the direct rights of the shareholders. Thus it is not open to the Court to go beyond the claim as formulated by the Belgian Government and it will not pursue its examination of this point any further." Exhibit JL-108 (*Barcelona Traction, Light and Power Co Ltd* (*Belgium v Spain*), Judgment 5 February 1970, ICJ Reports 1970 paragraphs 48 and 49).

204. For this reason as well Argentina's reliance on principles of domestic corporate law must fail. BG's claim is made under the Argentina-U.K. BIT. BG is an "Investor" who has made an "Investment" in Argentina within the definition of Article 1(a)(ii) of the treaty. It is further uncontroverted that BG's shares in GASA and MetroGAS are "assets" within the meaning ascribed to the term in this award pursuant to Argentine law. The meaning of the BIT is to be determined not by analogy with private law rules, but from the words of treaty itself and in the light of the purpose which it sets out to achieve.[181]

205. This Tribunal therefore has jurisdiction to hear BG's claims as they relate to its indirect shareholding in MetroGAS and GASA (Article 1(a)(ii) of the BIT).

2. Article 1(a)(iii) and (v) of the BIT[182]

206. Under Article 1(a)(iii) and (v) of the BIT, the term "Investment" also includes:

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181. The *Loewen* tribunal took this view in the context of a NAFTA dispute: Exhibit JL-398 (*The Loewen Group, Inc. and Raymond L. Loewen v United States of America, Loewen*, ICSID Case No ARB(AF)/98/3, Award 26 June 2003, paragraph 233).

182. "['I]nvestment' means every kind of asset defined in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made and admitted in accordance with this Agreement and in particular, though not exclusively, includes: . . (iii) claims to money which are directly related to a specific investment or to any performance under contract having a financial value; . . . (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources."

a) claims to money which are directly related to a specific "Investment";

b) claims to performance under contract having a financial value; or

c) business concessions conferred by law or under contract.

207. BG argued that its "Investment" takes the form of:

a) "*. . . claims to money and performance under contracts entered into by MetroGAS*"; [183] and

b) "*. . . benefits from the Licence granted by the Government to MetroGAS to carry out gas distribution services in Argentina.*"[184]

[Emphasis added]

208. BG's grievance is that Argentina breached the BIT causing damage to BG's "claims to money" and "claims to performance" under the MetroGAS License:[185]

> Here BG has an interest in the economic value of the Licence, i.e. the right for MetroGAS to receive a net stream of income allowing it, commercial

183. Statement of Claim, paragraph 50.

184. *Id.*

185. Post-Hearing Brief, paragraph 176.

> risks aside, to recover its investment and to obtain a reasonable rate of return. This is the asset that qualifies as a "claim to money" and "a claim to contractual performance under contract having financial value" under Article 1(a)(iii) and thus as a protected investment under the Treaty. [Footnote omitted].
>
> Further, BG has an interest that the rights of MetroGAS under the Licence (that is, the basic premises of MetroGAS' tariff regime) be respected, since those rights underpin precisely the economic value of the Licence . . . BG's interest in those Licence rights is the asset that qualifies as a protected investment under Article 1(a)(v) of the Treaty.
>
> [Emphasis added]

209. Does BG own "claims to money" and "claims to performance" or other rights under the MetroGAS License? May BG put "claims to money" and "claims to performance" or assert other rights derived from the MetroGAS License before this Tribunal? One of these two questions must be answered in the affirmative in order to establish BG's *ius standi*.

210. The answer to the first question is a matter of record. BG is not a party to the MetroGAS License[186] and Claimant has not established that it can directly assert

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186. Counter-Memorial on Jurisdiction, paragraph 91.

claims (to money, performance or otherwise) under the MetroGAS License. The question then becomes whether BG can bring those claims before this Tribunal indirectly, acting on behalf of MetroGAS.

211. Argentina correctly noted[187] that some treaties include a mechanism for foreign investors to bring claims on behalf of an entity in the territory of the host State which they own or control. One example is Article 1117 of the NAFTA:[188]

> 1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

212. Article 25(2)(b) of the Washington Convention

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187. *Alegato Final*, paragraph 88.

188. Exhibit J-140.

addresses standing from the perspective of the entity in the territory of the host State:

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on

> the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

. . . [Emphasis added]

213. Under both the NAFTA and ICSID treaties the "investor" must own or control the local entity.

214. The Argentina-U.K. BIT is of little assistance to BG. It does not provide a mechanism for BG to bring claims derived from the License on behalf of MetroGAS. "*Disputes with regard to an investment*" may only include "*an investor of one Contracting Party and the other Contracting Party.*"[189] BG does not have standing to seize this Tribunal with "claims to money" and "claims to performance", or to assert other rights, which it is not entitled to exercise directly. There is no authority on the record, including *CMS*,[190] identifying the source of the Tribunal's authority to depart from Article 8 of the BIT.

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189. Article 8 of the Argentina-U.K. BIT.

190. Exhibit JL-399 (*CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction 17 July 2003.)

215. This finding is consistent with BG's analysis of its own alleged damages. BG's expert did not provide a valuation of damage to BG's rights in the MetroGAS License independent of the loss of value of its shareholding interest in GASA and MetroGAS. The theory, of course, is that any damage to MetroGAS will reflect on the value of BG's equity ownership in GASA and MetroGAS. This finding does not disturb the end result.

3. Conclusion

216. This Tribunal has jurisdiction over BG's claims of breach of the Argentina-U.K. BIT relating to its shareholding interest in GASA and MetroGAS.

217. BG does not have standing to seize this Tribunal with "claims to money" and "claims to performance", or to assert any other right, derived from the MetroGAS License.

218. These determinations and the Tribunal's finding in paragraph 183 of the award are also dispositive of Argentina's contention that domestic courts have exclusive jurisdiction over BG's claims. Any rights which MetroGAS might have under the jurisdictional clause of the MetroGAS License are not an obstacle to the jurisdiction of this Tribunal over the claims of BG as set out in paragraph 216 above.

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F. Are Measures of General Application Actionable under the Argentina-U.K. BIT?

219. Argentina took the position in this arbitration that measures of general application are not actionable under the Argentina-U.K. BIT.

> *Para poder solicitar la aplicación de un tratado de protección de inversiones, las medidas que se alegan perjudiciales deben estar dirigidas específicamente contra aquéllas. Medidas universales que están destinadas a impactar sobre inversiones y sobre no inversiones, sobre nacionales y sobre extranjeros, no constituyen materia para ser consideradas por este Tribunal. Una atribución semejante importaría hacer caer bajo la competencia de este Tribunal una política pública y no un conflicto legal.*
>
> [Emphasis added]

220. Respondent found support for this position in *Methanex Corporation v. United States of America*,[191] a matter under Chapter 11 of the NAFTA (*Methanex I*).

221. Objecting to Argentina's submission, BG contended that it does not complain of economic conditions in Argentina, nor does it take issue with the government's general economic policies or measures. Rather, so BG, its claims relate to the measures that directly and specifically

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191. Exhibit JL-372 (*Methanex Corporation v. United States of America*, Partial Award, 7 August 2002).

violate concrete commitments that Argentina made to BG as a foreign investor in the privatized gas industry and that the measures infringed specific protections that Argentina owes to UK investors under the BIT.[192]

222. As regards *Methanex I*, BG submitted that the case was based on NAFTA, not on a bilateral investment treaty, and that the jurisdictional threshold set by Article 1101(1) of the NAFTA requires a stronger connection between the measures complained of and the investment than that provided by Article 8 of the BIT. BG contended that in any event, the findings support BG's case rather than Argentina's. Referring in this connection to the decision of the tribunal in *Pope & Talbot v Canada*, BG submitted that the measures need not be primarily directed at the investment as the measures complained of effectively repudiated the specific and fundamental guarantees deliberately provided by Argentina to entice BG's investment and on which BG relied in making that investment.[193]

223. Indeed, the Tribunal notes that the Argentina-U.K. BIT does not include language like the text at issue in *Methanex I* (*i.e.*, Article 1101 of the NAFTA) and the instant dispute is not a NAFTA dispute. However, this decision merits examination as it was heavily relied upon by Argentina.

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192. Counter-Memorial on Jurisdiction, paragraph 61.

193. Counter-Memorial on Jurisdiction, paragraphs 72-75.

Appendix D

224. At issue in *Methanex* were measures of general application enacted by the State of California to ban the sale and use of methyl tertiary-butyl ether, or MTBE, a gasoline additive. On 7 August 2002 the *Methanex I* tribunal rendered a partial award addressing whether measures of general application are actionable under the NAFTA. Concretely, the *Methanex I* tribunal interpreted the following provision of the NAFTA:

> Article 1101: Scope and Coverage
>
> 1. This Chapter applies to measures adopted or maintained by a Party relating to:
>
> (a) investors of another Party;
>
> (b) investments of investors of another Party in the territory of the Party; and
>
> (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.
>
> . . .
>
> [Emphasis added]

225. Argentina finds support in two *Methanex I* assumptions and findings, (i) that Article 1101(1) creates a restrictive jurisdictional threshold, and (ii) that the "relating to" language of Article 1101(1) of the NAFTA requires some "*legally significant connection*" beyond

effect between the complaining investor and the measures that are subject to complaint:[194]

> We decide that the phrase "relating to " in Article 1101(1) NAFTA signifies something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them, as the USA contends. Pursuant to the rules of interpretation contained in Article 31(1) of the Vienna Convention, we base that decision upon the ordinary meaning of this phrase within its particular context and in the light of the particular object and purpose in NAFTA's Chapter 11.
>
> . . .

226. However, the Tribunal is not convinced that the decision in *Methanex I* is of any support to Argentina's objections. First, *Methanex I* was not about the rights of an investor (BG) that is a shareholder injured by measures that also injure the local companies (GASA and MetroGAS) in which it invested. Rather, *Methanex I* had to do with the rights of a producer of an input (methanol) of a product (MTBE), when that final product is banned or restricted.

227. Second, for the reasons set out below, the Tribunal does not believe that *Methanex I* provides a correct interpretation of the NAFTA.

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194. Exhibit JL-372, *cit*, paragraph 147.

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228. The *Methanex I* tribunal viewed Article 1101(1) of the NAFTA as a jurisdictional threshold for an investor seeking to bring an investor-state claim, as opposed to a part of a general "scope and coverage" provision meant to introduce Chapter 11. *Methanex I* turns Article 1101 into a provision that makes the scope and coverage of Chapter 11 vary according to who is the complaining party, an interpretation at odds with the text and context of Article 1101 and the NAFTA.

229. Article 1101(1) is similar to introductory provisions in a number of other Chapters of NAFTA. Like those other introductory provisions, Article 1101 (1) sets out the scope of obligations under Chapter 11, including the obligations of Canada, Mexico and the United States, as well as the obligations of each government to all covered investors and their investments.

230. The context of Article 1101(1), as well as the object and purpose of the NAFTA, demonstrate that the interpretation of Article 1101(1) in *Methanex I* cannot be sustained. Several Chapters of NAFTA have exceptions to obligations that would simply be unnecessary if measures that did not "relate to" other NAFTA investors or their investments were outside the scope of the obligations. These exceptions would also be unnecessary if some "*legally relevant connection*" beyond or in addition to effect were necessary for a measure to be within the scope of the obligations. For instance, the following NAFTA provisions would be pointless under the interpretation of NAFTA Article 1101(1) in *Methanex I*:

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a) Article 1101(4), preserving the right of the State to perform basic social services such as law enforcement and public education;[195]

b) Articles 1109(4) and (5);[196]

c) Mexico's energy reservations in Annex III and other exceptions in Annexes VI and VII of the NAFTA;[197]

d) the reservations listed by Canada, Mexico and the United States in Annexes V and VI;[198]

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195. Since the exercise of these functions by the state does not "relate" or "refer" to foreign investors or indeed have any other connection other than effect on foreign investors or their investments.

196. The "equitable, non-discriminatory and good faith application of laws relating to . . . bankruptcy" and the other laws mentioned in those provisions would not require exemption from the transfers obligations, since such laws do not refer to foreign investors or their investments nor have a relationship beyond effect.

197. Because the non-discriminatory measures of general application listed there do not "relate or refer to" any investor or investment, and they would thus *ipso iure* escape the coverage of Chapter 11 under *Methanex I.*

198. Because none would be within the scope of the NAFTA if "relating to" meant "referring to" or some other relationship beyond the effect of the measures on foreign investors or their investments.

e) Article 1401(3) allowing NAFTA Parties to exclusively conduct or provide for public pensions plans and social security systems;

f) Articles 1405(5), (6), and (7), concerning equal competitive opportunities;[199]

g) Article 1411 on transparency;[200] and

h) the reservations laboriously listed by the three countries in Annex VII.[201]

231. Applied to the instant matter, *Methanex I* would discharge Argentina of its BIT obligations simply because

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199. Paragraphs 5, 6 and 7 establish an "equal competitive opportunities" standard to deal with the problem that applying exactly the same measures to all investors and institutions, domestic or foreign, may sometimes result in disparities of treatment (a situation commonly referred to as *de facto* denial of national treatment). Under the *Methanex I* theory, measures that were non-discriminatory on their face but had discriminatory effects would be outside the scope of the Chapter, and there would be no need to have special rules for assessing their legitimacy.

200. This provision would have little meaning if it would only apply to measures that "relate to" or "refer to" foreign investors. The provision clearly is intended to be a comprehensive obligation, and not only limited by a strained interpretation of Article 1101(1).

201. For example, the United States has a reservation in Annex VII related to financial services which applies generally to offers on commodity futures and options, thereby affecting both domestic and foreign investors/investments alike. Why would it be necessary for the United States to take an exception to the obligations of the treaty if this is a measure of general application.

its measures do not, on their face, target any investor, and it would render the promises used to attract foreign investment meaningless.

232. Finally and tellingly, Article 8(1) of the Argentina-U.K. BIT refutes Argentina's position that not all measures come under its application. This provision bans not just direct seizures of an investment, but also "*. . . measures having an effect equivalent to nationalization or expropriation*". If accepted, the *Methanex I* interpretation would largely nullify the prohibition of indirect expropriation and measures tantamount to expropriation.

233. The Tribunal finds no basis for adopting an interpretation that would render the substantive rights and obligations of the Argentina-U.K. BIT ineffective.

G. Is the Renegotiation Process an Obstacle to this Tribunal's Jurisdiction?

234. Argentina's position is quite simple: this Tribunal is precluded from adjudicating BG's claims because the renegotiation process contemplated by the emergency legislation may yield a successful outcome and a new license:[202]

> *157. El corolario de las medidas tomadas por la UNIREN en acuerdo con las Licenciatarias es que resulta inminente la aprobación final*

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202. *Memorial sobre Excepción de Incompetencia del Tribunal Arbitral*, paragraphs 157 and 158.

de la renegociación de la licencia de Metrogas, garantizándose que la relación contractual seguirá adelante por el prolongado lapso restante.

158. Mal puede entonces hablarse de expropiación, y mucho menos, de expropiación de una inversión, cuando de lo que se trata es de una improcedente deducción de la controversia arbitral, en pleno proceso de renegociación de los contratos.

235. More precisely, Argentina took the position that BG should be stripped of standing because MetroGAS might accept a new deal:[203]

159. . . . la inminente suscripción de los Acuerdos referenciados con la licenciataria Metrogas, pone en evidencia la total ausencia de legitimación de LA DEMANDANTE para incoar el presente arbitraje, pues ha quedado sin sustento su reclamo, y por ende las alegadas pérdidas que dice haber sufrido, todo lo que se enmarca en una desafortunada decisión empresaria, debiendo asumir el riesgo y cargar exclusivamente con las consecuencias de su decisión.

236. In opposition, BG contended that the renegotiation process is irrelevant to jurisdiction and, in any event, that Argentina's objection is misplaced, given that the renegotiation process relates to MetroGAS, not to BG. BG

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203. *Memorial sobre Excepción de Incompetencia del Tribunal Arbitral*, paragraph 159.

has never participated in the renegotiation process and its claims under the BIT are entirely independent of that process. Further, BG submitted that Argentina is trying to use this process to hide the devastating impact of the measures it took.[204]

237. The Tribunal recalls here Argentina's measures adopted during the summer of 2002, attempting to preclude investors from seeking redress in arbitration or before local courts.[205] Coupled with the finding of lack of jurisdiction now sought by Argentina, these measures would yield the following result:

a) only MetroGAS would have standing to appear in the renegotiation process;

b) the exclusive forum to bring grievances would be UNIREN (to the exclusion of the courts and arbitration under the Argentina-U.K. BIT);

c) the licensees and their foreign affiliates could not expect to enforce the original terms of the Regulatory Framework (including their license); and

d) any substantive right under the BIT would be lost.

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204. Counter-Memorial on Jurisdiction, paragraphs 77 and 78.

205. Resolution 308/02 (Exhibit J-347) and Decree 1090/02 (Exhibit J- 334).

238. Argentina, however, has offered no authority and no plausible interpretation of the BIT that would support a result so inconsistent with the object and purpose of the treaty, and so destructive of its representations to BG.

239. More generally, Argentina's argument that BG's claims are subject to the renegotiation process is irrelevant to a determination as to this Tribunal's jurisdiction. The claims are admissible and properly before the Tribunal as set out in Sections C to F above, and any determination as to the merits of BG's claims is a matter of substance. BG's claims under the treaty are independent of the renegotiation process. BG may at any time withdraw them, or even forego enforcement of an award, if the renegotiation were to yield a result to its satisfaction. The *CMS* tribunal properly addressed this issue:[206]

> It is not for the tribunal to rule on the perspectives of the renegotiation process or on what TGN might do in respect of its shareholders, as these are matters between Argentina and TGN or between TGN and its shareholders.

240. Argentina's jurisdictional objection as it relates to the renegotiation process is accordingly dismissed.

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206. Exhibit JL-399 (*CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction 17 July 2003, paragraph 86).

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H. Conclusion

241. In its examination of BG's claims for breach of Articles 5 and 2.2 of the Argentina-U.K. BIT the Tribunal shall consider Argentina's representations and commitments as set out in Section D above.

242. Subject to paragraph 217 of this award, the Tribunal has jurisdiction with respect to all of BG's claims which are admissible in this arbitration.

243. BG does not have standing to seize this Tribunal with "claims to money" and "claims to performance", or to assert in this arbitration any other right, derived from the MetroGAS License.

VII. Article 5 of the BIT (Expropriation)

244. BG contended that Argentina has breached Article 5 of the BIT as it allegedly expropriated BG's investments without compensation. BG's primary case on expropriation is that Argentina has expropriated its shareholding in MetroGAS through the substantial destruction of the value of that shareholding in breach of commitments in the Regulatory Framework. BG's alternative case is that Argentina has expropriated its rights under or related to the Licence, *i.e.*, BG's interest over the economic value of the Licence and BG's interest that the rights of MetroGAS under the Licence be respected. Argentina objected to BG's contention and submitted that there has been no violation of Article 5 of the BIT.

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245. Article 5 of the BIT provides as follows:

> (1) Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except of a public purpose related to the internal needs of that Contracting Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.
>
> (2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituent under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares, the provisions of paragraph (1) of this Article shall apply.

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246. The Tribunal summarizes in the following paragraphs the Parties' contention with regard to BG's expropriation claim.

A. Summary of Parties' Contentions

1. BG's Position

247. As to BG's primary case, the substantial destruction of the value of BG's shareholding in MetroGAS, BG contended that it is based on the well-established principle that a substantial deprivation of the value and economic benefit of an investment even without any alteration of formal ownership rights qualifies as an expropriation. In this connection, BG referred to the Wood-Collins Report, demonstrating that the value of BG's investment in MetroGAS has suffered a reduction of 99% in value due to the measures adopted by Argentina, described in Section D of Chapter III above.[207]

248. BG contended that, from a legal standpoint, a finding of expropriation does not require a demonstration that the host State has benefited from the taking. In any event, so argued BG, Argentina has admitted that its measures had a redistributive effect, transferring wealth to which BG was entitled. Further, BG submitted that the purpose for the adoption of the infringing measures is irrelevant: under Article 5(1) of the BIT compensation is due even where the expropriation is *"for a purpose related to internal needs"*.[208]

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207. Post-Hearing Brief, paragraphs 223-225.

208. Post-Hearing Brief, paragraph 226.

249. In addition, BG submitted that Argentina permanently eliminated the tariff regime guaranteed under the Regulatory Framework, since there is no prospect that BG will be reinstated to the position it enjoyed before Argentina adopted the measures.[209]

250. BG contended that Argentina disregards a wealth of international case law holding that regulatory and/or police power measures constitute expropriation if contrary to specific commitments and assurances granted to investors.

This is of particular relevance in the case of indirect expropriation where the investor retains formal title but the value of the rights attached to such title is diminished or destroyed. The measures can be said to, not only affect the value of the business, but effectively "deprive" the value of the business.[210]

251. Under BG's alternative case, BG submitted that its rights under or related to the Licence are assets that qualify as a protected investment under Article 1(a) of the BIT, and in particular sub-paragraphs (iii) and (v) of this provision. BG contended that Argentina's abolition of the right to economic equilibrium and the tariff regime underpinning this principle constitutes an expropriation of BG's rights under or related to the Licence.[211]

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209. Post-Hearing Brief, paragraph 227.

210. Post-Hearing Brief, paragraphs 228-237.

211. Post-Hearing Brief, paragraphs 238-241.

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2. Argentina's Position

252. Argentina denied that any expropriation under Article 5 of the BIT has occurred. Argentina contended that the reasonableness, proportionality and the purpose of the emergency measures need to be taken into account to ascertain whether there has been an expropriation under the BIT.[212]

253. In contending that only an indirect or *de facto* expropriation may be of relevance to the present dispute, Argentina submitted that the wording of Article 5 of the BIT makes it apparent that the measures must at least produce the same effect as an expropriation.[213]

254. Argentina further indicated that MetroGAS recorded a net income of US$99.3 million during the first semester of 2006. Argentina also argued that the value of MetroGAS shares has increased since the crisis and that this increase is consistent with the term of 35 years for which the MetroGAS License was stipulated.[214]

255. In emphasizing the wide scope of the regulatory and police powers of a State, Argentina insisted that a claim for indirect expropriation calls for a test of proportionality, balancing the lawfulness and significance of purpose of the measures, including whether such purpose could have

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212. *Alegato Final*, paragraph 313.

213. *Alegato Final*, paragraphs 317-319.

214. *Alegato Final*, paragraphs 321-323; 428.

reasonably been achieved in a less detrimental manner, against the damage suffered as a consequence of the measures.[215]

256. As to BG's expectations under the Regulatory Framework, Argentina contended that the applicable Regulatory Framework is the same as that approved when BG decided to invest, adapted to the new macroeconomic context resulting from the crisis. In analyzing the Regulatory Framework, Argentina contended that contrary to BG's allegations, Argentina had not amended specific regulations concerning the gas industry, but has issued a general rule applicable to the society as a whole. According to the Emergency Law, the goal was "*ordenar el contexto macroeconómico a partir de la crisis, manteniendo las mismas condiciones de previsibilidad para la inversión.*" Further, Argentina drew attention to Sections 18.2 and 18.3 of the MetroGAS License, in which it is held, *inter alia*, that any provisions of the License may be held invalid and unenforceable pursuant to a judgment of the local courts. Thus, the Emergency Law and the provisions adopted as a consequence thereof could not be in breach of the BIT.[216]

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215. *Alegato Final*, paragraphs 327-329.

216. *Alegato Final*, paragraphs 331-336; 390-398. For Section 18.2 of the MetroGAS Licence, see paragraph 48 above. Section 18.3 of the MetroGAS License provides that: "*Si alguna disposición de esta Licencia fuera declarada inválida o inexigible por sentencia firme del tribunal competente, la validez y exigibilidad de las restantes disposiciones de esta Licencia no serán afectadas. Cada estipulación de la Licencia será* válida *y exigible en la mayor medida permitida por la ley aplicable.*"

257. Further, Argentina submitted that BG's claim for expropriation is inadmissible on grounds of unjust enrichment as, between 1992 and 2001, MetroGAS collected from users an overcharge amounting to between 6% and 7% as prevention of an economic emergency. This means that loss of profitability was anticipated with the payment of the country risk overcharge.[217]

B. The Tribunal's Findings

258. In determining whether Argentina has violated Article 5 of the BIT by expropriating BG's investment, the Tribunal has to define what constitutes expropriation, as it is not defined in the BIT.

259. For the purpose of the present dispute, direct expropriation is of no relevance, since it is "*understood as the forcible* appropriation *by the State of the tangible or intangible property of individuals by means of administrative or legislative action*".[218] This is not what has happened in this case because Argentina has not appropriated BG's investment. Rather, the Tribunal has to consider whether Argentina has adopted "*measures having effect equivalent to . . . expropriation*", as provided in Article 5(1) of the BIT, constituting indirect

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217. *Alegato Final*, paragraphs 369-370.

218. *LG&E Energy Corpl, LG&E Capital Corp., LG&E Internacional Inc. V. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability dated 3 October 2006, paragraph 187.

expropriation.[219]

260. Tribunals have defined indirect expropriation as measures that have the effect of "interfering" with or "neutralizing" property.

261. This standard appears in the Iran-U.S. Claims Tribunal's *Starrett Housing Corporation*:[220]

> [I]t is recognized in international law that the measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have expropriated them and the legal title to the property formally remains with the original owner.

262. Subsequent tribunals, including *Impregilo*, *Lauder*, and *Pope & Talbot*, have likewise applied this standard in determining whether an investor's property has been indirectly expropriated.

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219. For a comprehensive summary of cases and customary international law in general with respect to the definition of expropriation see JL-405 (*Fireman's Fund Insurance Company v The United Mexican States*, NAFTA ICSID Case No. ARB(AF)/02/01, Award dated 17 July 2006, Paragraph 176).

220. JL-157 (*Starrett Housing Corporation v. Islamic Republic of Iran*, Case No 24, Interlocutory Award No ITL 32-24-1, 19 December 1983, 4 Iran-US CTR 122, p. 154).

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263. The *Impregilo* Tribunal provided that:[221]

> . . . all the key decisions relating to indirect expropriation mention the 'interference' of the Host State in the normal exercise, by the investor, of its economic rights.
>
> Moreover, the effect of the measures taken must be of such importance that those measures can be considered as having an effect equivalent to expropriation.

264. The *Lauder* Tribunal held that ". . . *indirect expropriation or nationalization is a measure that does not involve an overt taking, but that effectively neutralizes the enjoyment of the property.*"[222]

265. Finally, *Pope & Talbot* held that indirect expropriation required consideration of ". . . *whether that interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from its owner.*"[223]

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221. JL-460 (*Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision of the Tribunal on Objections to Jurisdiction, 22 April 2005, paragraphs 278 and 279).

222. JL-351 (*Ronald S Lauder v Czech Republic, Lauder*, UNCITRAL Arbitration, Final Award, 3 September 2001, paragraph 200).

223. JL/326 (*Pope & Talbot Inc v Government of Canada*, Interim Award 26 June 2000, paragraph 100).

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266. Most recently, the tribunal in *LG&E Energy Corp., LG&E Capital Corp., LG&E International Corp. v. The Argentine Republic* summarized as follows the requirements for establishing indirect expropriation under the Argentina- U.S. BIT as follows:[224]

> Generally, the expression "equivalent to expropriation" or "tantamount to expropriation" found in most bilateral treaties, may refer both, to the so-called "creeping expropriation" and to the de facto expropriation. Their common point rests in the fact that the host State's actions or conduct do not involve "overt taking" but the taking occurs when governmental measures have "effectively neutralize[d] the benefit of property of the foreign owner." Ownership or enjoyment can be said to be "neutralized" where a party no longer is in control of the investment, or where it cannot direct the day-to- day operations of the investment. As to the differences, it is usual to say that indirect expropriation may show itself in a gradual or growing form –creeping expropriation— or through a sole and unique action, or through actions being quite close in time or simultaneous –de facto expropriation.

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224. *LG&E Energy Corpl, LG&E Capital Corp., LG&E Internacional Inc. V. The Argentine Republic,* ICSID Case No. ARB/02/1, Decision on Liability dated 3 October 2006, paragraph 188; *see* also Exhibit JL-352 (*CME Czech Republic B.V. v. Czech Republic,* UNCITRAL, Partial Award dated 13 September 2001, paragraph 604).

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267. Thus, the question with regard to BG's primary case is whether the measures adopted by Argentina, as described in Chapter III.D above, have had the effect of "interfering with" or "neutralizing" the benefit of BG's property, specifically, of BG's shareholding in MetroGAS.

268. The Tribunal notes that a State may exercise its sovereign power in issuing regulatory measures affecting private property for the benefit of the public welfare. Compensation for expropriation is required if the measure adopted by the State is "*irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that ". . . any form of exploitation thereof. . ." has disappeared. . . .*"[225] Conversely, a measure does not qualify as equivalent to expropriation if the "*investment continues to operate, even if profits are diminished*".[226]

269. Having considered the foregoing, the Tribunal concludes that Argentina has not violated Article 5 of the BIT, as it did not expropriate BG's investment.

270. Specifically, the impact of Argentina's measures has not been permanent on the value of BG's shareholding in MetroGAS. It might well be that the measures adopted by Argentina were severe causing a fluctuation of BG's

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225. Exhibit JL-397 (*TECMED SA v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003, paragraph 116).

226. *LG&E* (paragraph 191); *see also Pope & Talbot* (paragraphs 101-102).

investment during the crisis. However, MetroGAS' business never halted, continues to operate, and has an asset base which is recovering.

271. Further, in reliance on the set of requirements set forth in *Pope & Talbot*, the Tribunal does not see that a substantial deprivation of BG's shareholding in MetroGAS has occurred, depriving BG of the control of the investment in MetroGAS or managing the day-to-day operations of MetroGAS. Nor have the measures caused the arrest and detention of MetroGAS officials or employees. Nor has Argentina interfered in the administration of the company, impeding the distribution of dividends to MetroGAS' shareholders, or interfering in the appointment of officials and managers.

272. It follows that BG's alternative case in relation to BG's rights under or related to the License must fail as well, given that the Tribunal does not find that the measures adopted by Argentina caused a permanent, severe deprivation of BG's rights with regard to its investment.

VIII. Article 2.2 of the BIT (Promotion and Protection of Investment)

273. In addition to expropriation, BG argued that Argentina has breached the standards of treatment provided in 2.2 of the BIT. Argentina objected to BG's contention.

274. Article 2.2 of the BIT provides as follows:

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Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

A. Fair and Equitable Treatment

275. What follows is a summary of the numerous legal and factual contentions of BG and Argentina as presented in the Parties' written and oral submissions with respect to Article 2.2 of the BIT.

1. Summary of Parties' Contentions

a. BG's Position

276. BG contended that Argentina treated BG's investment unfairly and inequitably in failing to provide BG with a stable and predictable investment environment in accordance with its legitimate and reasonable expectations.

277. Referring to the origin of the standard of fair and equitable treatment and its relationship with

the international minimum standard of treatment, BG contended that fair and equitable treatment is an overriding general duty which encompasses other standards and certainly the international minimum standard for the treatment of aliens.

278. In reliance upon recent case law, BG contended that the minimum standard of treatment, also as interpreted by the NAFTA Free Trade Commission in relation to Article 1105(1) of the NAFTA, equating fair and equitable treatment with the customary international law minimum standard of treatment of aliens, has evolved such that it is an autonomous treaty concept to be given its plain meaning, and thus not simply synonymous with the customary international minimum standard. In BG's view, case law has consistently held that fundamentally altering the investment framework against legitimate investor expectations is by definition unfair and inequitable.[227]

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227. BG's Post-Hearing Brief, paragraphs 258-269 referring to Exhibit JL-495 (*Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award dated 14 July 2006, paragraph 372); Exhibit JL-472 (*Iurii Bogdanov, Agurdino- Invest Ltd and Agurdino-Chimia JSC v. Republic of Moldova*, Award dated 22 September 2005, paragraph 4.2.4); Exhibit JL-471 (*Eureko B.V. v. Republic of Poland*, Partial Award dated 19 August 2005, paragraph 232); Exhibit JL-447 (*GAMI Investments Inc. v. The United Mexican States*, UNCITRAL /NAFTA, Final Award of 15 November 2004, paragraph 91); Exhibit JL-431 (*MTD Equity Sdn Bhd and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004, paragraph 114); Exhibit JL-429 (*Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/3, Final Award dated 30 April 2004, paragraph 98); Exhibit JL-397 (*TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003,

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279. To the extent that Argentina relied upon its well-intentioned measures to face a state of emergency, BG contended that Argentina ignores that the standard of fair and equitable treatment is an objective standard and that it is not necessary to establish bad faith, as recently held in *Azurix Corp. v. Argentina.*[228]

280. With respect to the factual scenario, BG submitted that Argentina lured investors like BG into investing in its recently privatized gas industry by representing to them that the investment would be governed by a stable tariff regime, which would guarantee them a reasonable real-dollar income.

281. BG contended that the tariff regime owed its promised stability to the following main features:

a) that tariffs would provide efficient and prudent operators with sufficient revenue to cover all reasonable costs, including the cost of capital, taxes, amortization and a "reasonable rate of return" (the "economic-financial equilibrium" or the principle of "recovery of costs");

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paragraph 154); Exhibit JL-352 (*CME Czech Republic B.V. v. Czech Republic,* UNCITRAL Partial Award dated 13 September 2001, paragraph 611); Exhibit JL-350 (*Metalcad Corporation v. The United Mexican States,* NAFTA ICSID Case No. ARB(AF)/97/1, Award dated 30 August 2000, paragraph 99); Exhibit JL-345 (*Pope & Talbot v. Canada,* NAFTA UNCITRAL, Award dated 10 April 2001, paragraph 111).

228. BG's Post-Hearing Brief, paragraph 271 referring to Exhibit JL-495, *cit*, paragraph 372.

b) that tariffs would be calculated in U.S. dollars and converted to pesos for billing purposes at the applicable exchange rate;

c) that tariffs would be adjusted every six months in accordance with the US PPI;

d) that tariffs would be subject to the Five-Year Review and the Extraordinary Review, which would ensure the continued economic-financial equilibrium of the License;

e) that tariffs would not be frozen or subject to price controls without compensation; and

f) that the tariff regime would not be changed without the Licensees' consent.[229]

282. BG asserted that after enticing BG to invest, Argentina took a series of damaging measures that destroyed the key guarantees of the Regulatory Framework under which BG reasonably expected to operate. These measures were at odds with the stability and predictability of the investment framework required by the principle of fair and equitable treatment. In summary, BG submitted that since August 2000 MetroGAS has operated in an unpredictable and, to a large extent, incomprehensible investment environment, because the government of Argentina:

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229. Statement of Claim, paragraphs 12 and 433; Post-Hearing Brief, paragraph 5.

a) suspended the US PPI adjustment of tariffs, by way of an injunction issued in August 2000 and subsequent decisions of ENARGAS;

b) flatly abolished the calculation of MetroGAS' tariffs in dollars, as the Convertibility Law of 2002 converted the July 1999 dollar tariffs into pesos at the artificial rate of one to one and definitely abolished the adjustment of those tariffs in accordance with the US PPI;

c) effectively abolished the tariff review mechanisms established under the Regulatory Framework. Both the Five-Year Review and the Extraordinary Review, would have required Argentina to adjust those peso tariffs to cover MetroGAS' drastically increased costs in order to assure its reasonable rate of return; and

d) established a little more than fictitious renegotiation process, which has produced no concrete serious offer to re-establish the guarantees of the tariff regime, or alleviate the imbalance of the License.[230]

b. Argentina's Position

283. Argentina objected to the violation of the standard of fair and equitable treatment under Article 2.2 of the BIT and contended that the impact of the collapse on

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230. Statement of Claim, paragraphs 440-442.

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BG's business is related to a general crisis in which the measures adopted were aimed at maintaining the sustainability of the economy in general, and of the public service companies in particular.

284. Argentina submitted that the fair and equitable treatment is not an independent standard and it argued that this standard only requires treating investors in accordance with the international minimum standard. Argentina criticized that BG's broad interpretation turns the fair and equitable treatment standard into a strict liability standard with negative consequence for both the States and international law. Argentina relied on certain NAFTA and ICSID decisions and suggested that this is also the position held by the United States when approving their several BIT models.[231]

285. Referring to Article 8.4 of the BIT, Argentina stated that the Parties expressly stipulated the applicability of

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231. *Memorial de Contestación*, paragraphs 338 *et seq.*; *Alegato Final*, paragraphs 430-442 referring to Exhibit JL-489 (*International Thunderbird Gaming Corp. v. The United Mexican States*, NAFTA UNCITRAL, Award dated 26 January 2006); Exhibit JL-347 (*Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/02, Award dated 25 June 2001); Exhibit JL-314 (*Robert Azinian, Kenneth Davitian, and Ellen Baca v. The United Mexican States*, NAFTA ICSID Case No. ARB(AF)/97/2, Award dated 1 November 1999); Exhibit JL-329 (*SD Myers, Inc. v. Government of Canada*, NAFTA UNCITRAL, First Partial Award dated 13 November 2000); Exhibit JL-429 (*Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award dated 30 April 2004).

the law of the State party to the controversy, in this case, the law of the Argentine Republic. Therefore, the Tribunal must take into account the determination of the powers of the State to issue measures tending to protect their public policy, and the acknowledgment of any such powers on the basis of the rules contained in the BIT. In Argentina's view, the well-intended measures taken by Argentina were reasonable and justified in terms of the macro-economic context in which they were adopted to face the state of emergency. Thus, it must be borne in mind that under international law, the fair and equitable treatment standard must be applied differently in normal circumstances and under an emergency situation.[232]

286. In Argentina's view the Regulatory Framework has not been subject to radical change and it has at all times been honored. Contrary to BG's intention, Argentina held that the Regulatory Framework offers no guarantees, including the alleged guarantee to dollar denominated tariffs. Further, BG may not claim a right to annual profitability for 35 years, plus amortizations or short-term profits, as in cases of financial investments, since BG made an investment in public service assets. It has to be noted that the impact of the collapse on BG's business is related to a general crisis in which the measures adopted were aimed at maintaining the sustainability of the economy in which public service companies operate.[233]

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232. *Alegato Final*, paragraphs 444-450.

233. *Alegato Final*, paragraphs 455-465.

287. As to BG's submission that States are to maintain stable investment environments in accordance with the investor's legitimate expectations, Argentina submitted that the Parties did not include a "stabilization clause" in the BIT. Therefore, it is inadmissible for BG to try to achieve the same effect, as it would seem to imply that the State cannot modify the provisions on the basis upon which the investment was made. Emphasizing that the Emergency Law was grounded, Argentina asserted that even if BG's interpretation of the standard of fair and equitable treatment were to follow, its claim ought to be dismissed nonetheless.[234]

288. In summary, Argentina submitted that the program which has been applied since 2002 had the following priorities:

a) initiating a path towards the recovery of economic activities;

b) immediately handling the urgent social situation brought about by the economic depression;

c) preventing the collapse of the financial system;

d) precluding the dilution of saving deposits frozen within the financial system;

e) re-organizing the Argentine, provincial and municipal financial systems;

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234. *Alegato Final*, paragraphs 471-474.

f) facilitating the performance of such contracts as may have been affected by the crisis, precluding the unjust enrichment of certain groups and the resulting poverty of others; and

g) normalizing financial relations with the rest of the world and with multilateral credit organizations affected by the default on public debt.[235]

2. The Tribunal's Findings

289. The Tribunal must determine whether the measures adopted by Argentina and described in Chapter III.D above are in breach of the standard established under the first sentence of Article 2.2 of the BIT:

> Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security in the territory of the other Contracting Party.

290. The Parties raised the issue of the relationship between the undefined concept of fair and equitable treatment in the BIT and the international minimum standard under general principles of international law. More precisely, BG argued that fair and equitable treatment in the Argentina-U.K. BIT is an overriding general duty which encompasses other standards -

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235. *Alegato Final*, paragraph 466.

and certainly the international minimum standard. Conversely, Argentina took the position that the fair and equitable standard of Article 2.2 of the BIT affords no protection in addition to the international minimum standard. Thus, at the very least, there is no dispute between the Parties that a breach of the international minimum standard automatically yields a violation of the obligation to accord fair and equitable treatment under the Argentina-U.K. BIT.

291. For the reasons set out below, this Tribunal has concluded that the measures adopted by Argentina fall below the international minimum standard and it is consequently not necessary for this award to examine whether the Argentina-U.K. BIT provides a more generous independent standard of protection.

292. The Tribunal's analysis starts with the standard of fair and equitable treatment as aptly articulated in *Waste Management II* - drawing from the *SD Myers, Mondev, ADF* and *Loewen* decisions:[236]

> . . . the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading

236. Exhibit JL-429 (*Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award dated 30 April 2004, paragraph 98).

> to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.

293. This point of departure is particularly fitting as all of these NAFTA tribunals were under an obligation to consider that the concept of fair and equitable treatment "*. . . does not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.*"[237]

294. But *Waste Management II* is apposite to the instant for one more reason: its unambiguous statement that commitments to the investor are relevant to the application of the minimum standard of protection under international law:

> In applying [the] standard it is relevant that treatment is in breach of representations made by the host state which were reasonably relied on by the claimant.

295. As illustrated by *Generation Ukraine v. Ukraine*, this principle is also recognized in the context of litigation under bilateral investment treaties:[238]

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237. *See* Notes of Interpretation issued by the NAFTA Free Trade Commission in 31 July 2001.

238. Exhibit JL-407 (*Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated 16 September 2003, paragraph 20.37).

> . . . the protection of [legitimate expectations] is a major concern of the minimum standards of treatment contained in bilateral investment treaties.

296. And as illustrated by *Revere Copper and Brass, Inc. v. Overseas Private-Investment Corp.*, the importance of assurances given to investors predates the BIT generation:[239]

> We regard these principles as particularly applicable where the questions is, as here, whether actions taken by a government contrary to and damaging to the economic interests of aliens are in conflict with undertakings and assurances given in good faith to such aliens as an inducement to their making the investments affected by the action.

297. In this connection, the tribunal in *LG&E* summarized the nature of the investor's expectations as follows:[240]

> It can be said that the investor's fair expectations have the following characteristics: they are based on the conditions offered by the host State at the time of the investment; they may not be established

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239. Exhibit JL-135 (*Revere Copper and Brass, Inc v Overseas Private - Investment Corp.* award of 24 August 1978, 56 *International Law Reports* 258, at 1331).

240. *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability dated 3 October 2006, paragraph 130).

> unilaterally by one of the parties; they must exist and be enforceable by law . . .

298. The duties of the host State must be examined in the light of the legal and business framework as represented to the investor at the time that it decides to invest. This does not imply a freezing of the legal system, as suggested by Argentina. Rather, in order to adapt to changing economic, political and legal circumstances the State's regulatory power still remains in place. As previously held by tribunals addressing similar considerations, ". . . *the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.*"[241]

299. Similarly, the tribunal in *CMS* concluded that:[242]

> It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but

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241. *Saluka Investments v. Czech Republic* (UNCITRAL Partial Award dated 17 March 2006, paragraph 304); see also Exhibit JL-374 (*Marvin Feldman v. The United Mexican States*, NAFTA ICSID Case No. ARB(AF)/99/1 Award dated 16 December 2002, paragraph 112): "[g]overnments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue."

242. Exhibit JL-464 (*CMS Gas Transmission Company v. the Argentine Republic*, ICSID Case No ARB/01/8, Award dispatched to the parties on 12 May 2005, paragraph 277).

neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made.

300. The words of the President of Argentina in his presentation of the BIT to the Argentine Congress in 1992 highlight the need to establish a climate of stability and confidence to attract investments:[243]

> *. . . A través de ellos, los estados aceptan mantener inalterables durante su vigencia ciertas normas de tratamiento de inversiones, con lo que se espera establecer un clima de estabilidad y confianza para atraer inversiones.*
>
> [Emphasis added]

301. As to the requirement of bad faith, Argentina relies on the findings in *Genin*[244] and *Waste Management II*.[245] In the former decision, the tribunal held solely that a violation of the minimum standard "*would include acts showing a willful neglect of duty . . . or even subjective bad faith*" (emphasis added). In the latter, the tribunal found that the standard set forth in the *Neer* case, involving willful

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243. Exhibit J-108.

244. Exhibit JL-347 (*Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/02, Award dated 25 June 2001, paragraph 367).

245. Exhibit JL-429 (*Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award dated 30 April 2004, paragraphs 93 and 98).

neglect of duty and bad faith, has been rejected. Therefore, the Tribunal holds that, in concurrence with prior arbitral findings, the violation of the standard of fair and equitable treatment does not require bad faith by the host State.[246]

302. The Tribunal is mindful of the evolution of the international minimum standard. The NAFTA tribunal in *Thunderbird* summarized this evolution as follows:[247]

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246. Exhibit JL-373 (*Mondev International Ltd. v. The United States of America*, ICSID Case No. ARB(AF)/99/2, Award dated 11 October 2002, paragraph 116); Exhibit JL-398 (*The Loewen Group, Inc. and Raymond Loewen v. The United States of America*, ICSID Case No. ARB(AF)/98/3, Award dated 26 June 2003, paragraph 132); Exhibit JL-433 (*Occidental Exploration and Production Company v The Republic of Ecuador*, London Court of International Arbitration, Administered Case No UN 3467, Final Award of 1 July 2004, paragraph 186); Exhibit JL-397 (*TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003, paragraph 153); Exhibit JL-429, *cit*, paragraph 93; Exhibit JL-464 (*CMS Gas Transmission Company v the Argentine Republic*, ICSID Case No ARB/01/8, Award of 12 May 2005, paragraph 280); *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability dated 3 October 2006, paragraph 129); Exhibit JL-495 (*Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award dated 14 July 2006, paragraph 372); Exhibit JL-435 (*Siemens AG v The Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004, paragraphs 293-300).

247. Exhibit JL-489 (*International Thunderbird Gaming Corp. v. The United Mexican States*, NAFTA UNCITRAL Award dated 26 January 2006, paragraph 194); see also *e.g.*, Exhibit JL-435, *cit*, paragraphs 299-300; Exhibit JL-495, *cit*, paragraphs 361-372; Exhibit JL-373, *cit*, paragraph 116; Exhibit JL-329 (*S.D.*

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> The content of the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law. Notwithstanding the evolution of customary law since decisions such as [the] *Neer Claim* in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent international jurisprudence. For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.

303. In the instant matter, the measures adopted by Argentina fall below the international minimum standard for several reasons.

304. Faced with the economic crisis of inflation and public deficit of the late 1980s, Argentina sought to attract in particular foreign investors to invest in formerly state-owned gas companies. The Gas Law, Gas Decree and MetroGAS License, described in detail in Chapter III.B above, were all part of an attractive Regulatory Framework addressing specific risks with the emphasis on an efficient, just and reasonable tariff regime. It is not a mere coincidence that the different regulations were enacted within two years after the BIT was signed.

Myers, Inc. v. Government of Canada, NAFTA UNCITRAL, First Partial Award dated 13 November 2000, paragraphs 259 *et seq.*).

305. Of predictable interest to foreign investors were those parts of the Regulatory Framework in conjunction with the specific commitments represented by Argentina, as described in Chapter VI.D.1 above, in which Argentina guaranteed, *inter alia*, (i) to apply U.S. dollars as the currency of reference for the calculation of tariffs before their conversion in Argentine pesos for billing purposes (Article 41(1) of the Gas Decree and Section 9.2 of the *Reglas Básicas* of the MetroGAS License); (ii) semi-annual adjustment regime of the tariffs in accordance with the US PPI (Section 9.4.1.1 of the *Reglas Básicas* of the MetroGAS License; (iii) the entitlement of the revision of the tariffs every five years, and, upon request an "extraordinary review" on "objective grounds" to maintain that tariffs are at a sufficient level to provide a reasonable rate of return (Article 38 of the Gas Law); and (iv) the reassurance that the licenses may not be modified without the consent of the licensees, entitling the investor to compensation in case the Government changed the tariff regime (Sections 9.8 and 18.2 of the MetroGAS License). The availability of real-dollar tariffs was specifically highlighted in the Information Memorandum circulated by Argentina to promote the privatization amongst foreign investors.[248]

306. These conditions appealed to BG, and resulted in its investment in MetroGAS. Considering also the incorporation of provisions relating to the stability of the Regulatory Framework in the MetroGAS License,[249] BG could reasonably rely on the Regulatory Framework.

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248. See paragraphs 160-176 above.

249. See paragraphs 48-51 above.

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307. Argentina, however, entirely altered the legal and business environment by taking a series of radical measures, starting in 1999, as described in Chapter III.D above. Argentina's derogation from the tariff regime, dollar standard and adjustment mechanism was and is in contradiction with the established Regulatory Framework as well as the specific commitments represented by Argentina, on which BG relied when it decided to make the investment. In so doing, Argentina violated the principles of stability and predictability inherent to the standard of fair and equitable treatment.

308. In this connection it bears emphasis that the second suspension of the US PPI, formalized by Decree 669/00, recognized that the licensees had "*derecho legítimamente adquirido*" to the US PPI tariff adjustments[250] and acknowledged that Bilateral Investment Treaties are a part of the legal framework relevant to investments in Argentina.[251] As it turns out, the gas distribution tariffs have not been adjusted for inflation since July 1999 and, thus, have remained frozen at pre-crisis values.

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250. Exhibit J-226, Decree 669/00, page 2: "*Que dicho sistema de ajuste constituye una premisa básica, condición de los pliegos licitatorios y de las ofertas adjudicadas que fueron su consecuencia, y por lo tanto importa un derecho legítimamente adquirido por parte de las Licenciatarias adjudicatarias de cada licencia.*"

251. Exhibit J-226, Decree 669/00, page 1: "*Que el proceso privatizador y las inversiones resultantes encuentran amparo legal en la normativa vigente, y en especial, también en los Tratados de Protección Recíproca de Inversiones suscriptos por al REPUBLICA ARGENTINA y ratificados por diversas leyes.*"

309. Argentina also breached the international minimum standard in relation to UNIREN's authorization to renegotiate the Government agreements with public service providers. As stated at paragraph 80 above, the Emergency Law and subsequent legislation were enacted to promote a new deal with the licensees, impeding the application and execution of the original Regulatory Framework. Also, Argentina enhanced the violation of the standard of fair and equitable treatment under the BIT by formalizing in Resolution 308/02 and Decree 1090/02 the exclusion from the imposed renegotiation process of any licensee that sought redress in an arbitral or other forum.

310. In summary, when the situation of currency devaluation materialized, Argentina fundamentally modified the investment Regulatory Framework, which, as stated above, provided for specific commitments that were meant to apply precisely in a situation of currency devaluation and cost variations. Thus, Argentina reversed commitments towards BG, when BG relied the most on its legitimate and reasonable expectations of a stable and predictable business and legal investment environment.

B. Protection and Constant Security

311. Further, the Parties are in dispute about the scope and application of the second part of the first sentence of Article 2.2 of the BIT, which reads *"Investments of investors of each Contracting Party . . . shall enjoy protection and constant security in the territory of the other Contracting Party"*.

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312. BG submitted that the measures taken by Argentina were at odds with Argentina's active protection and constant security obligation of BG's investments, as required under the first sentence of Article 2.2 of the BIT.

1. Summary of Parties' Contentions a. BG's Position

313. BG follows the decision of the tribunal in *Azurix*, by linking the standard of fair and equitable treatment to the general duty to protect investments.[252]

314. In reliance on the findings in *AAPL*[253] *AMT*[254] and *CME*,[255] BG submitted that the standard of protection and constant security provided in the BIT is one of due diligence, requiring Argentina to exercise reasonable care and actively protect BG's investment. Thus, the duty of protection and security of investments is infringed by government measures that fail to apply the rules specifically designed to govern and protect the investment by withdrawing protection and security previously granted to an investment, regardless of whether property

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252. Post-Hearing Brief, paragraph 275.

253. Exhibit JL-208 (*Asian Agricultural Products Ltd v. Sri Lanka*, ICSID Case No. ARB/87/3, Award dated 27 June 1990 (AAPL)).

254. Exhibit JL-275 (*American Manufacturing & Trading Inc v. The Republic of Zaire*, ICSID Case No. ARB/93/1, Award dated 21 February 1997 (AMT))

255. Exhibit JL-352 (*CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award dated 13 September 2001, paragraph 613).

is physically destroyed or whether judicial remedies may be available.[256]

315. More specifically, BG contended that in accordance with *AAPL* the duty to ensure the protection and security of the investment embodies an *"objective standard of vigilance"* which is violated by the *"mere lack or want of diligence, without any need to establish malice or negligence."*[257]

316. Referring to the decision in *AMT*, BG submitted that the tribunal interpreted the standard as requiring the active conduct of the host State in taking *"all measure of precaution to protect the investments."*[258]

317. As to the scope of the standard, BG relies on *CME*, which found that:

> The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued.[259]

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256. Statement of Claim, paragraphs 421 *et seq.*; Post-Hearing Brief, paragraphs 273 *et seq.*

257. Post-Hearing Brief, paragraph 273 quoting *AAPL* (paragraphs 48, 77 and 85).

258. Post-Hearing Brief, *ibid.*, quoting *AMT* (paragraph 6.05).

259. Exhibit JL-352 (*CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award dated 13 September 2001,paragraph 613).

318. With respect to BG's factual contentions concerning the violation of Argentina's protection and constant security obligation, BG submitted that Argentina's duty involved, in particular, and at the very least, the application of the Regulatory Framework that it set up for the specific purpose of ensuring the viability, legal and economic protection and security of the investment. BG asserted that Argentina did exactly the opposite, in complete disregard for the protection and constant security of BG's investment.[260] The detailed factual contentions of BG are set forth in paragraphs 276-282 above. Although they relate to the standard of fair and equitable treatment, they are relevant with regard to the standard of protection and constant security as in BG's view the duty of protection and constant security of investments is part of the standard of fair and equitable treatment.

b. Argentina's Position

319. Argentina denied that it has violated the standard of protection and constant security under the BIT and criticized that BG does not specify which duty to act it has violated. Argentina contended that BG has neither a factual nor a legal basis to make Argentina responsible for having omitted due diligence.

320. In contesting the relevance of the case law relied upon by BG, Argentina stated, without the benefit of any references, that jurisprudence and doctrine are

260. Post-Hearing Brief, paragraph 276.

unanimous in conceiving that the standard of protection and security is a standard of "physical protection". BG, however, has not invoked any act of physical violence against its investment.[261]

321. Relying on *Tecmed*, Argentina highlights that "*the security and protection guarantee is not absolute and that it does not impose upon the Government issuing it strict liability.*" In the context of the present case, Argentina submitted that MetroGAS had all the possibilities of resorting to the legal system in force in Argentina in order to protect its contractual rights under the same terms and conditions as any other litigant.[262]

322. Finally, Argentina relies on the notion of emergency and draws attention to the fact that, during the period under examination, the country was undergoing the worst economic, social and institutional crisis of its history.[263]

2. The Tribunal's Findings

323. The Tribunal can be relatively brief in relation to the allegations of BG. BG's claim with respect to the standard of protection and constant security must fail.

324. The Tribunal observes that notions of "protection and constant security" or "full protection and security" in

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261. *Memorial de Contestación*, paragraph 574.

262. *Memorial de Contestación*, paragraphs 575 and 576.

263. *Memorial de Contestación*, paragraph 577.

international law have traditionally been associated with situations where the physical security of the investor or its investment is compromised. Indeed, the authorities relied upon by BG confirm this:

a) in *AAPL* the tribunal had to determine under the Sri Lanka-U.K. BIT whether the physical destruction of property of AAPL and the killing of a farm manager and permanent staff members were in violation of the provision of protection and security under Article 2.2 of the Sri Lanka- U.K. BIT;[264]

b) in *AMT* the tribunal found that under the U.S.–Zaire BIT, Zaire had violated the protection and security standard required by the treaty in relation to lootings carried out against AMT's investment.[265]

325. Similarly at issue in *E.L.S.I* was the occupation of the investor's plant by its workers following its requisition by the Mayor of Palermo[266] and *Wena Hotels Limited v. Arab Republic of Egypt* relates to the forceful seizure of property.[267]

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264. *AAPL* (paragraphs 28 and 53).

265. *AMT* (paragraphs 6.05-6.12).

266. Exhibit JL-195 (*Elletronica Sicula S.p.A. (E.L.S.I.) (United States of America v. Italy),* 1989 ICJ Report 1989 RLA 56, Judgment dated 20 July 1989).

267. Exhibit JL-331 (*Wena Hotels Ltd v A RA-b Republic of Egypt,* ICSID Case No ARB/98/4, Award of 8 December 2000, paragraphs 84-95).

326. The Tribunal is mindful that other tribunals have found that the standard of "*protection and constant security*" encompasses stability of the legal framework applicable to the investment. By relating the standards of "*protection and constant security*" and "*fair and equitable treatment*" such tribunals have found that the host State is under an obligation to provide a "*secure investment environment*".[268] However, in light of the decisions quoted above, the Tribunal finds it inappropriate to depart from the originally understood standard of "*protection and constant security*".

327. Considering the facts of this dispute and the Parties' submissions, the Tribunal notes that BG has not alleged physical violence or damage in the implementation of the measures adopted by Argentina, nor does the Tribunal see that such violence or damage has in fact occurred.

328. Accordingly, the Tribunal concludes that Argentina has not breached the standard of protection and constant security set out in Article 2.2 of the Argentina-U.K. BIT.

C. Unreasonable and Discriminatory Measures

329. BG also contended that, in violation of the second sentence of Article 2.2 of the BIT, Argentina impaired BG's use and enjoyment of its investment by unreasonable and

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268. Exhibit JL-495 (*Azurix Corp. v The Argentine Republic*, ICSID Case No. ARB/01/12, Award dated 14 July 2006, paragraph 408); *Siemens v. The Argentine Republic*, ICSID Case No ARB/02/8, Award of 6 February 2007, paragraph 303, referring to the Argentina-Germany BIT which includes, however, the qualified term of "legal security" in the relevant provision.

discriminatory measures, by placing a disproportionate and discriminatory burden on MetroGAS and BG. Argentina objected to BG's allegations.

330. The second sentence of Article 2.2 of the BIT provides as follows:

> Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.

1. Unreasonable Measures

(a) Summary of Parties' Contentions

(i) BG's Position

331. BG contended that Argentina's measures are unreasonable because they dismantled the entire tariff regime of the gas distribution industry.

332. As the term "unreasonable measures" is not defined, BG relies on the following definition provided by the commentator R. Happ that,

> [I]t is possible to understand 'unreasonable' in two different ways: Either as a procedural concept, that is whether the governmental measure furthers the government's objectives (sic.) is the less restrictive measure and whether the impairment

> is proportional to the achieved end; or as a substantive concept. However, since it is always in the eye of the beholder whether the measure is substantially reasonable or not, the substantive concept approach must be rejected."[269]

333. BG submitted that Argentina's unreasonable measures of dismantling the entire tariff regime of the gas distribution industry are "*contrary to the expectations of BG and of any reasonable and impartial person*". According to BG, Argentina's Regulatory Framework created and fuelled legitimate expectations which were specifically incompatible with the sorts of measures that it subsequently adopted. It was, thus, unreasonable to strip BG of the key guarantees upon which its investment was based.[270]

334. Further, BG contended that the measures are unreasonable, because, in comparison to BG, other sectors were excluded from the scope of the *pesificación* and freezing of prices and tariffs, or otherwise benefited from compensatory and mitigating measures, or were at least permitted to increase their prices in accordance with inflation.[271]

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269. Statement of Claim, paragraph 449, quoting R. Happ, "Dispute Settlement under the Energy Charter Treaty", (2002) 45 German Yearbook of International Law 331.

270. Statement of Claim, paragraphs 450-451; Post-Hearing Brief, paragraph 277.

271. Statement of Claim, paragraph 452.

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(ii) Argentina's Position

335. In its defence, Argentina contended that the measures adopted where justified and proportional to the aim sought and within the context of the collapse of the Argentine economy.

336. In equating the legal meaning of "unreasonable" with "arbitrary",[272] Argentina contended that the arbitrariness standard demands the verification of certain extremes: (i) the capricious violation of the legal system in force without reason or justification; and (ii) the determination of the context which gives rise to the adoption of the government measures. For Argentina, measures are not arbitrary absent a premeditated intent to breach the rules in force and to act in a way contrary to the law.[273]

337. Argentina submitted that by respecting the law, it took adequate steps to safeguard the general welfare of all players in the Argentine economy, including foreign investors. Explaining in detail the aim of each measure taken by it, Argentina contended that the actions taken were reasonable and proportional to the purpose sought. Argentina's goal was that companies could continue to operate, to obtain revenues and make a profit. Argentina

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272. The Tribunal notes that the Spanish versions of Argentina's submissions refer also to "*medidas arbitrarias*" and not only to "*medidas irrazonables*" (see, *e.g.*, *Alegato Final*, paragraph 476).

273. *Alegato Final*, paragraphs 476-479.

puts special emphasis on the commenced renegotiation process of utility contracts to which MetroGAS is part as well.[274]

338. In the alternative and in reliance on *E.L.S.I.*, Argentina contended that an action taken by the host State may be considered illegal and yet not be arbitrary under international law.[275]

(b) The Tribunal's Findings

339. The Tribunal has to determine whether the measures taken by Argentina, described in Chapter III.D above, are unreasonable in a way that impairs the ". . . *management, maintenance, use, enjoyment or disposal* . . ." of BG's investment in Argentina.[276]

340. The term "unreasonable" is not defined in the BIT. Therefore, the Tribunal has to look at its ordinary meaning for international law.

341. While there might be some overlap, the Tribunal does not deem it appropriate to equate "unreasonableness" and "arbitrariness". First, the term "arbitrary" does not appear in Article 2.2 of the Argentina-U.K. BIT. Moreover, one connotation of "arbitrariness" under international

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274. *Memorial de Contestación*, paragraphs 420-469; 510-525; *Alegato Final*, paragraphs 471-482.

275. *Memorial de Contestación*, paragraph 516.

276. Article 2.2 of the Argentina-U.K. BIT.

law involves a breach beyond the ordinary meaning of "reason" seemingly calling for "... *a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.*"[277]

342. Like the "fair and equitable treatment" standard, "reasonableness" should be measured against the expectations of the parties to the bilateral investment treaty, rather than as a function of the means chosen by the State to achieve its goals:[278]

> ... As with the fair and equitable standard, the determination of reasonableness is in its essence a matter for the arbitrator's judgment. That judgment must be exercised within the context of asking what the parties to bilateral investment treaties should jointly anticipate, in advance of a challenged action, to be appropriate behaviour in light of the goals of the Treaty.[279]

343. Thus, withdrawal of undertakings and assurances given in good faith to investors as an inducement to their making an investments is by definition unreasonable and a breach of the treaty.

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277. Exhibit JL-195 (*Elletronica Sicula S.p.A. (E.L.S.I.) (United States of America v. Italy)*, 1989 ICJ Report 1989 RLA 56, Judgment dated 20 July 1989).

278. See paragraphs 294 to 300 of this award.

279. Exhibit JL-352 (*CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award dated 13 September 2001, paragraph 158).

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344. Argentina adopted certain measures to address its economic, political and social crisis. It is not for this Tribunal to pass judgment on the reasonableness or effectiveness of such measures as a matter of political economy. Rather, this Tribunal is concerned with the interpretation and application of Article 2.2 of the Argentina-U.K. BIT. As indicated above, Argentina unilaterally withdrew commitments which induced BG to make its investment in Argentina and this constitutes unreasonable action and a breach of this provision of the treaty.

345. Argentina guaranteed, *inter alia*:

(a) the application of U.S. dollars as the currency of reference for the calculation of tariffs before their conversion into Argentine pesos for billing purposes;

(b) a semi-annual adjustment regime of the tariffs in accordance with the US PPI;

(c) revision of the tariffs every five years;

(d) an "extraordinary review" mechanism based on "objective grounds" to ensure that tariffs provide a reasonable rate of return; and

(d) the reassurance that the licenses may not be modified without the consent of the licensees, entitling the investor to compensation in case the government changed the tariff regime.

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> The availability of real-dollar tariffs was specifically highlighted in the Information Memorandum circulated by Argentina to promote the public tender amongst foreign investors.[280]

346. Unilateral withdrawal by Argentina of these key components of the Regulatory Framework was from the perspective of the Argentina-U.K. BIT unreasonable and it was therefore in breach of the second sentence of Article 2.2 of the treaty.

2. Discriminatory Measures

(a) Summary of Parties' Contentions

(i) BG's Position

347. BG contended that the measures adopted by Argentina discriminated against BG. BG stressed that in contrast to other sectors of the Argentine economy that were permitted to recover swiftly from the impact of the measures, Argentina consciously placed a disproportionate burden on largely foreign-controlled energy companies like MetroGAS.

348. BG advocated a flexible interpretation of what constitutes a "discriminatory" measure. In reliance on *Feldman* and *Occidental*, BG contended that measures may be discriminatory even if not based on nationality, and even where discrimination is not express or intentional.

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280. See paragraphs 160-176 above.

Rather, it suffices that the measures have a discriminatory effect. Further, according to BG, it is not necessary that differential treatment be in the same economic sector.[281]

349. BG submitted that the Argentine Government itself noted the discrimination by stating that *"one sector transfers resources to another."*[282] The measures taken by Argentina to limit the impact of its measures in sectors such as oil and gas production, banking and public contracts, were not made available to gas distributors and transporters. Thus, Argentina's measures were and continue to be discriminatory.[283]

(ii) Argentina's Position

350. Argentina objected to BG's legal and factual contentions and invoked the principle of discriminatory treatment articulated in *E.L.S.I.* and *Genin*: *i.e.*, that discriminatory treatment is to give foreign investors a less favorable treatment than that granted to nationals.[284] Argentina added to this understanding the notion that discrimination is characterized by capricious, unreasonable or absurd criteria.[285]

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281. Statement of Claim, paragraph 456.

282. Exhibit J-472.

283. Post-Hearing Brief, paragraph 278.

284. *Memorial de Contestación*, paragraphs 495-502.

285. *Alegato Final*, paragraph 483.

351. Argentina submitted that the measures were general in nature, aimed at overcoming a period of generalized collapse of the economy and extended equally to all inhabitants, in all sectors. Thus, foreign investors as licensees of public services cannot remain outside this situation. The measures taken by Argentina affected all entities falling within the special category set forth in Article 8 of the Emergency Law, including BG. Argentina explained that each public service is governed by different regulations, agreements and characteristics that provided for different rate adjustments from the ones established in the provisions applicable to the natural gas industry:[286]

> *No puede pretenderse válidamente que el régimen aplicable al agua potable y a las cloacas sea igual al aplicable al gas natural o a los transportes públicos o a la electricidad o al servicio postal: todos ellos son servicios públicos pero no por ello están sujetos a las mismas normas o regímenes.*[287]

352. Argentina also relied on the renegotiation process, which it portrayed as evidence of equality of treatment of MetroGAS and BG.[288]

353. It was also Argentina's position that at no time did MetroGAS or BG receive unequal treatment within the

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286. *Memorial de Contestación*, paragraphs 530-568; *Alegato Final*, paragraphs 486-495.

287. *Memorial de Contestación*, paragraph 531.

288. *Memorial de Contestación*, paragraphs 530-568; *Alegato Final*, paragraphs 486-495.

same sector, as MetroGAS was not subject to a special or more onerous sacrifice.

(b) The Tribunal's Findings

354. The Tribunal notes Claimant's reliance on *Marvin Feldman v. Mexico* and *Occidental v. Ecuador* in support for its claim of discrimination.[289] Both of these cases relate to the alleged breach of an obligation which, in the Argentina-U.K. BIT, is set out in Article 3.[290] Claimant did not argue that Argentina breached Article 3, nor did it provide an explanation of the relationship between Article 2.2 and Article 3.

355. Nonetheless, the Tribunal accepts for the sake of its analysis, that a measure in breach of the national treatment or MFN standards of Article 3 of the BIT would unavoidably also be "discriminatory" in the sense of the second sentence of Article 2.2 of the BIT.

356. In determining whether discrimination has occurred, the Tribunal considers it appropriate to

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289. Post-Hearing Brief, paragraph 379.

290. Article 3 of the BIT provides as follows: "(1) Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State. (2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third State."

follow the "three-part" test discussed in *Thunderbird v. Mexico.*[291] Under this test, it is necessary to:

a) identify the relevant entities of the national treatment comparison, to determine whether they are in like circumstances;

b) consider the relative treatment received by each such entity so as to ascertain the best level of treatment available to any other domestic or foreign investor; and

c) consider such factors as may be relevant to justify any difference in treatment.

357. It may well be that the measures adopted by Argentina did differentiate gas-distribution companies from other public service providers. However, there is no discussion on the record as to why BG was "in like circumstances" to companies operating, for instance, in the transmission and distribution of electricity.

358. In fact, it would at first glance appear that MetroGAS was not "in like circumstances" relative to other licensees who did not agree to the suspension of the US PPI adjustments at the invitation of the Secretary of Energy on 6 January 2000, and again on 17 July 2000.

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291. Exhibit JL-489 (*International Thunderbird Gaming Corp. v. The United Mexican States*, NAFTA UNCITRAL, Award dated 26 January 2006, paragraph 170).

359. The Tribunal notes that also by applying the standards set out in *E.L.S.I.* to establish the existence of discriminatory measures, as suggested by BG, it is not apparent that Argentina's measures were "*not taken under similar circumstances against another national.*"[292]

360. Under the circumstances, the Tribunal is not convinced that Argentina's measures discriminated against BG in the sense of the second sentence of Article 2.2 of the Argentina-U.K. BIT.

D. Observance of Obligations Entered Into With Regard to BG's Investments

361. The final part of Article 2.2 of the Argentina-U.K. BIT provides that:

> Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

362. In reply to a question put to the Parties by the Tribunal, BG took the position that Argentina had breached the Argentina-U.K. BIT by violating the MetroGAS License:[293]

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292. JL-195 (*Case Concerning the Elettronica Sicula S.p.A. (United States of America v Italy)*, Judgment of 20 July 1989, ICJ Rep. 1989, pages 61-62).

293. Post-Hearing Brief, paragraph 282.

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Argentina's violations of the Licence do amount to a violation of the Treaty, and in particular the prohibition of expropriation without compensation, fair and equitable treatment, and all the subordinated standards of treatment of Article 2(2) of the Treaty.

363. This claim must fail in the light of the Tribunal's earlier finding that BG does not have standing to seize this Tribunal with "claims to money" and "claims to performance", or to assert other rights, derived from the MetroGAS License (see Chapter VI.E.2 above).

364. However, BG also contended that the same principles included in the MetroGAS License were incorporated in the Gas Law, the Gas Decree and the Bidding Rules.[294] Chapters III.A-B and VI.D.1 of this award discuss the genesis of the privatization of *Gas del Estado*. Chapter VI.D.1 focuses in particular on the representations made by Argentina to promote interest in the privatization and attract foreign investors, including BG.

365. The rules announced by Argentina in the Information Memorandum and materialized in the Gas Law, the Gas Decree and the Bidding Rules were clearly not addressed at MetroGAS alone. As indicated in paragraph 176 of this award, BG is entitled to rely on these commitments in connection with its allegations of breach of the substantive provisions of the BIT with respect to its "Investment" in Argentina.

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294. Post-Hearing Brief, paragraph 283.

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366. In Chapter VIII.A above, this Tribunal has already concluded that the adoption of measures by Argentina which destroyed key elements of the much publicized Regulatory Framework, constitutes a breach by Argentina of its substantive obligation under the Argentina-U.K. BIT to accord BG fair and equitable treatment.

IX. National Emergency and State of Necessity

367. Defending the measures as described in Chapter III.D above, Argentina submitted that the severe economic, social and political crisis it has undergone exempted Argentina from liability in light of a state of emergency or a state of necessity. Argentina referred in its primary defense to Article 4 of the BIT, contending that it has not violated any standard of the BIT. Alternatively, Argentina resorted to the doctrine of "necessity" under customary international law. To summarize, Argentina argued that even if the Tribunal finds that there has been a violation of the BIT, measures adopted by Argentina to palliate the greatest crisis in Argentine history were justified by a "state of necessity" under both Argentine and customary international law.[296] BG objected to both defenses.

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295. Initially, Argentina submitted as a separate defence that the measures it had adopted were constitutional under Argentine law (*see Memorial de Contestación*, paragraphs 686-700). However, during the course of the proceedings, Argentina appears to have incorporated this defence in the state of necessity defence under international law.

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368. The Tribunal will now summarize the Parties' contentions.

A. National Emergency under the BIT

369. Article 4 of the BIT provides as follows:

> Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot or resulting from arbitrary action by the authorities in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State. Resulting payments shall be freely transferable.
>
> [Emphasis added]

1. Summary of Parties' Contentions

a. Argentina's Position

370. Argentina submitted that Article 4 of the BIT expressly establishes the case of a foreign investor suffering losses by virtue of a state of national emergency. Thus, the BIT legitimates actions taken by the host State, provided that the foreign investor is treated in equality with other investors, domestic or foreign, with respect to

losses suffered in the territory of the host State.[296]

371. As to the standard required under Article 4 of the BIT, Argentina contended that there should be no discrimination as regards measures established to repair or compensate losses suffered. The term "losses" incurred is used in a broad sense, including any kind of harm. With regard to compensation, Argentina highlighted that Article 4 of the BIT does not demand for payment of compensation, but refers to the treatment given to investors as regards "*restituciones, indemnizaciones, compensaciones u otros resarcimientos.*"[297]

372. Relying on *AAPL*, Argentina submitted that the losses allegedly incurred are not limited to destruction of property due to armed hostilities, insurrections or other uses of force, but refer to any situation of risk or disaster on a national level calling for immediate action.[298]

373. Objecting to BG's comparison drawn on the basis of Article XI of the Argentina-U.S. BIT, which BG submitted was an "exculpatory expression" not contained in the Argentina- U.K. BIT, Argentina contended that the principle enshrined in Article XI of the Argentina-U.S. BIT exists regardless of its inclusion in the BIT. According to Argentina, a bilateral investment treaty cannot prevent

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296. *Memorial de Contestación*, paragraphs 670-671; *Alegato Final*, paragraphs 496-497.

297. *Memorial de Contestación*, paragraph 672; *Dúplica*, paragraph 739; *Alegato Final*, paragraph 506.

298. *Memorial de Contestación*, paragraph 673; *Dúplica*, paragraphs 736-742; *Alegato Final*, paragraphs 499-505.

a State party from adopting such measures as it deems necessary to maintain the public order and guarantee the protection of its own essential security interests.[299]

374. Following this interpretation, Argentina contended that it acted in accordance with Article 4 of the BIT. The measures adopted by Argentina were due to a state of national emergency, pre-dating the adoption of the measures. Thus, the losses the population suffered were not the result of the measures taken by Argentina, but the result of the combination of factors leading to the state of emergency, including:

a) the resignation of the constitutional President of the Argentine Republic amidst an extraordinary political-institutional collapse, followed by a succession of several presidents;

b) the strong devaluation of the national currency in the international markets;

c) the collapse of the Argentine banking system; and

d) the serious social crisis with poverty, indigence and unemployment rates hitting record levels and tens of people killed in the midst of confrontations in the Federal Capital City, as well as in the rest of the country.[300]

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299. *Dúplica*, paragraph 743.

300. *Memorial de Contestación*, paragraph 676; *Alegato Final*, paragraphs 513-515.

375. Argentina stated that in light of these severe circumstances, the enactment of the Emergency Law was a measure to mitigate the damages suffered by society as a whole, by according equal treatment to all national and foreign companies.[301]

b. BG's Position

376. BG disagrees that Article 4 of the BIT has an exonerating effect. The only point of concurrence with Argentina's interpretation of Article 4 of the BIT is that in BG's view this provision does not require Argentina to make reparation to a protected investor on any specific basis. Article 4 provides that if any domestic or third-state investor is accorded any such reparation for loss suffered in a situation of "national emergency", among others, then qualifying investors under the BIT "*shall be accorded . . . treatment . . . no less favourable*".[302]

377. BG objected to Argentina's submission that Article 4 of the BIT is not limited to cases of physical destruction of property caused by force in circumstances of armed conflict. According to BG, Article 4 of the BIT is in the nature of provisions commonly referred to as "war and civil disturbance" clauses or "losses due to war" clauses. The purpose of Article 4 of the BIT was to cover cases in which general international law or insurance contracts exclude state responsibility altogether, or the payment of compensation. BG submitted that in any event, neither

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301. *Memorial de Contestación*, paragraph 678; *Alegato Final*, paragraphs 520-521.

302. Reply, paragraph 396.

Article 4 of the BIT nor any other provision of the BIT "legitimizes" the measures adopted by Argentina, or Argentina's failure to provide compensation.[303]

378. In summary, BG's position is that Article 4 of the BIT operates in situations where: (i) an investor has suffered damages as a result of armed conflict or similar circumstances; but (ii) that investor does not have a specific entitlement to reparation under another provision of the BIT or customary international law; and (iii) another investor, whether domestic or foreign, has been granted reparation, whether by operation of another treaty, domestic law, or simply on a discretionary basis. In such circumstances, Article 4 of the BIT provides that a qualifying investor is entitled to "treatment no less favorable" than that accorded to the investors who have been accorded compensation or other forms of reparation. BG relied also on the findings of the tribunals in *AMT* and *AAPL*.[304]

379. Further, BG submitted that the content of Article 4 of the BIT is clear from the context of the BIT as a whole. In relation to Article 2.2 of the BIT, BG submitted that in the event that the treatment established under Article 2.2 of the BIT is not afforded, and Article 2.2 of the BIT

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303. Reply, paragraphs 392(a) and 397 *et seq.*, also referring to the decision in *CMS* where the tribunal analyzed Article XI of the Argentina- U.S. BIT, which includes in BG's view a typical exculpatory language (paragraphs 332 *et seq.*); Post-Hearing Brief, paragraph 292(a)-(b).

304. Reply, paragraphs 406-409, referring to *AMT* (paragraphs 3.04 and 6.4-6.14).

is accordingly breached, reparation is due under general rules of customary international law. Similarly, the right to receive "prompt, adequate and effective compensation" according to Article 5.1 of the BIT requires no support from Article 4 of the BIT in order to operate. Therefore, BG concluded, Argentina cannot invoke Article 4 of the BIT to restrict the distinct obligations incumbent upon it under Articles 2.2 and 5.1 of the BIT.[305]

380. Finally, BG contended that even if Article 4 of the BIT were applicable in the present case, it would only underline the preferential treatment that Argentina accorded to several other sectors and activities. BG submitted that as compensation for the impact of the Emergency Law, Argentina has adopted special rules with respect to several categories of investors, including gas producers, banks, construction companies, seaport and airport operators.[306]

2. The Tribunal's Findings

381. The Tribunal finds that no state of emergency defense is available to Argentina under the Argentina-U.K. BIT. In the Tribunal's view, neither Article 4 of the treaty, nor the BIT as a whole, exonerate Argentina's breaches on grounds of state of emergency or state of necessity.

382. Applying the interpretive principles of Article 31 of the Vienna Convention, this Tribunal concludes that

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305. Reply, paragraphs 410-414.

306. Reply, paragraphs 160 and 415-416.

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Article 4 of the BIT does no more than ensure that the State does not treat the foreign investor less favorably than its own investor or investors of any third State with regard to *"restitution, indemnification, compensation or other settlement"* in case the foreign investor suffers losses due to, *inter alia*, a state of national emergency. Article 4 of the BIT provides for a specific expression of the national treatment and most favored nation standard in relation to the compensation of losses resulting from certain actions. Article 4 is merely concerned with the situation where nationals of the host State are indemnified or compensated, or benefit from a settlement. In this context, foreign investors should not be treated less favourably. Liability and compensation are thus expressly mandated, not excused.[307]

383. In this context, the tribunal in *CMS* held under the Argentina-U.S. BIT, which contains a similar provision as the present Article 4 of the BIT, that:

> The plain meaning of the Article [Article IV(3)] is to provide a floor treatment for the investor in the context of the measures adopted in respect of the losses suffered in the emergency, not different from the applied to nationals or other foreign investors. The Article does not derogate from the Treaty rights but rather ensures that any measures

307. Note in this context also the title of Article 4 of the BIT: "Compensation for Losses".

directed at offsetting or minimizing losses will be applied in a non-discriminatory manner.[308]

384. The fact that Article 4 of the BIT contemplates the state of national emergency as a distinct category of exceptional circumstances is of no assistance to Argentina. This fact was noted by the tribunal in *LG&E* in respect of a similar provision in the Argentina-U.S. BIT (Article IV.3).[309]

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308. Exhibit JL-464 (*CMS Gas Transmission Company v the Argentine Republic*, ICSID Case No ARB/01/8, Award of 12 May 2005, paragraph 375); *see also Enron Corporation Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award dated 15 May 2007, paragraph 320, referring to Article IV(3) of the Argentina-U.S. BIT, which contains similar wording as Article 4 of the present BIT: "*The Tribunal* must note that the only meaning of Article IV(3) is to provide a minimum treatment to foreign investments suffering losses in the host country by the simultaneous interplay of national and most favored nation *treatment, and this is only in respect of measures the State "adopts in relation to such losses", that is corrective or compensatory measures.*"; *AMT* (paragraph 6.14), referring to Article IV(1)(b) of the U.S.–Zaire BIT, which wording is similar to Article 4 of the present BIT and stating that Article IV(1)(b) of the U.S.–Zaire BIT "*reinforce*[s] *further the engagement of the responsibility of the State for ensuring the protection and security of the investment made . . . in accordance with . . . the BIT.*"

309. *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v The Argentine Republic* (*LG&E*), ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, paragraphs 243 and 261). Article IV(3) of the Argentina-U.S. BIT provides: "*Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or*

However, the tribunal in *LG&E* did not accept Argentina's invocation of state of necessity on the basis of Article IV.3 of the Argentina-U.S. BIT, but rather of Article XI for a limited period of time (1 December 2001 – 26 April 2003).

385. The Tribunal notes that the Argentina-U.K. BIT does not include a national security exception analogous to Article XI of the Argentina-U.S. BIT.[310] Consequently, the Tribunal need not express an opinion as to a possible national security exception, or its impact on a State's obligation to pay compensation for breaches of the BIT, as it was done in the *LG&E* award, rendered under the Argentina-U.S. BIT.

386. Further, there is no support for Argentina's submission that, in the absence of an express provision, Article XI of the Argentina-U.S. BIT should automatically be read into the Argentina-U.K. BIT.

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other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses."

310. Article XI of the Argentina-U.S. BIT: "*This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.*"

387. Accordingly, the Tribunal concludes that Argentina cannot invoke a state of emergency or state of necessity on the basis of the BIT to excuse liability for the breach of Article 2.2 of the BIT.

B. The State of Necessity under Customary International Law

388. Having reached the above conclusion, the Tribunal turns now to Argentina's alternative defense that it be excused from liability based on the state of necessity under customary international law.

389. As stated above, Argentina has contended in the alternative that in the event the Tribunal should come to the conclusion that there was a breach of the BIT, Argentina should be exempt from liability in the light of the doctrine of state of necessity or state of need under customary international law, as codified in Article 25 of the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (hereinafter the "ILC Draft Articles"). BG objected to the application of the doctrine of necessity in this case and submitted that even if it were applicable, its constituent elements, as set forth in Article 25 of the ILC Draft Articles, are not made out on the facts of this case; ultimately, even if one were to concede Argentina's defense of necessity, the legal consequence would be that Argentina has an obligation to compensate BG for the losses it incurred since the inception of the adopted measures, pursuant to Article 27 of the ILC Draft Articles.

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390. The Tribunal finds it useful to quote in full Article 25 of the ILC Draft Articles:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>
> (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
>
> (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
>
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>
> (a) The international obligation in question excludes the possibility of invoking necessity; or
>
> (b) The State has contributed to the situation of necessity.

1. Summary of Parties' Contentions

a. Argentina's Position

391. Argentina contended that the exoneration of a State from international liability in case of a "state of necessity"

is expressly recognized by customary international law, as codified in Article 25 of the ILC Draft Articles. State of necessity, according to Argentina, is a defense contemplated in international law that is binding both for the Argentine Republic and for the United Kingdom. In Argentina's view, a "state of necessity" exists where the State is compelled to depart from an international obligation with another State in order to preserve an essential state interest in a situation of grave or imminent danger. In this connection, Argentina contended that it complied with legal emergency criteria provided for in its National Constitution.[311]

392. Argentina referred to several cases supporting its position that the legal protections accorded to foreign investors under bilateral investment treaties do not deprive States parties of their sovereign powers to maintain public order and address emergencies. Argentina submitted that such cases suggest that State obligations to foreign investors and investments are qualified by non-textual but legally operational understandings about the continuation of State emergency powers and other State powers.[312]

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311. *Memorial de Contestación*, paragraphs 700-716; *Dúplica*, paragraphs 771 *et seq.*; *Alegato Final*, paragraphs 522-525.

312. Kingsbury Report (paragraphs 28-34), referring to, *inter alia*, Exhibit JL-195 (*Elletronica Sicula S.p.A. (E.L.S.I.) (United States of America v. Italy)*, 1989 ICJ Report 1989 RLA 56, Judgment dated 20 July 1989, *E.L.S.I.* paragraphs 74 and 127) and Exhibit JL-397 (*TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003, paragraphs 118, 133, 139).

393. Following the requirements set forth in Article 25 of the ILC Draft Articles, Argentina contended that the Argentine government was compelled to act due to a serious emergency situation which compromised its essential interests, its economic-financial survival, as well as social and institutional stability. Argentina referred in particular to the statements of Mr. Ratti and Mr. Simeonoff, explaining the budgetary and financial limitations of the Argentine State and the impoverishment of the population causing unprecedented social unrest.[313]

394. Referring to the requirements of Article 25(1)(a) of the ILC Draft Articles, Argentina further contended that the measures adopted amounted to the only way of protecting the essential interests of the State. In this regard it is Argentina's position that "the only way" criterion for a plea of necessity can best be met by introducing a proportionality and rational alternative test. Argentina expanded on its view of the appropriate test to be applied by the Tribunal: (i) whether the measures had a legitimate objective; (ii) whether the measures were adapted to the pursuit of such objective; and (iii) whether the government adopted the less disruptive alternative. In Argentina's view the *pesification* of dollar-denominated obligations and the restructuring of the private and public obligations was a proportionate and reasonable solution within the context of the very serious emergency in Argentina. Argentina pointed out that the existence of diverging points of views as to whether the adopted measures were the only way to cope with the

313. *Alegato Final*, paragraphs 527-530.

crisis in late 2001 is not an impediment to the application of the "state of necessity" defense, as there will always be controversy regarding governmental, economic and financial measures.[314]

395. Argentina also submitted that the measures it adopted did not seriously affect any essential interest of any other State, or of the international community.[315]

396. In addition, Argentina contended that none of the international obligations invoked by BG exclude the state of necessity, especially in the light of Article 4 of the BIT, which foresees situations which may constitute a state of necessity.[316]

397. Further, Argentina submitted that it has not contributed to the occurrence of the "state of necessity". Argentina points to external factors that decisively led to the emergency situation, including the rise in interest rates, the crisis in other emerging markets, the devaluation in Brazil, and the ensuing decline in exports. Argentina supported its view by reference to the statement of its expert witness Prof. Roubini.[317]

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314. *Memorial de Contestación*, paragraphs 726-753; *Alegato Final*, paragraphs 531-536; Kingsbury Report (paragraph 39).

315. *Alegato Final*, paragraph 537.

316. *Alegato Final*, paragraph 538.

317. *Memorial de Contestación*, paragraphs 718-725; *Alegato Final*, paragraphs 539-542.

398. Finally, Argentina rejected BG's contention that should the defense of a state of necessity be accepted, the State invoking it is indefectibly bound to redress the damages suffered. Argentina contended that on the contrary, it would make no sense to accept that the State acted in a state of necessity, protecting its essential interests, and to demand reparation, thus risking the very essential interests that the State intended to protect. Objecting to BG's reliance on Article 27 of the ILC Draft Articles, Argentina referred to its expert witness Prof. Kingsbury, stating that the ILC Draft Articles do not set forth that compensation should be granted in all cases where the state of necessity is alleged.[318]

b. BG's Position

399. BG objected to Argentina's contentions.

400. As a preliminary point, BG submitted that the U.K. formally opposed to the inclusion by the ILC of a provision on "*necessity*" (*i.e.*, the present version of Article 25 of the ILC Draft Articles). BG highlighted that the ILC Draft Articles are a non-binding codification of customary international law. As a consequence, Article 25 of the ILC Draft Articles can have no application in bilateral relations involving the U.K., and therefore no role in a claim under the present BIT. BG characterized the U.K. as a "*persistent objector*" to the rule set forth in Article 25 of the ILC Draft Articles.[319]

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318. *Alegato Final*, paragraphs 543-548.

319. Post-Hearing Brief, paragraphs 296-301.

401. Further, BG criticized Argentina's understanding that the State's obligations under a BIT become qualified by that State's powers to take measures in a situation of emergency under a national law of general application. In BG's view this places Article 8(4) of the BIT and Argentine law on a footing of equality, a result that would be inconsistent with Article 27 of the Vienna Convention according to which treaty obligations preempt conflicting national law. Further, the lack of workable definitions of and distinctions between "*emergency*" and "*necessity*" would grant the State a self- judging power to escape its international obligations. BG confirmed, though, that some BITs, including U.K. BITs, do expressly grant a right of derogation in times of "*extreme emergency*", and that right is both explicit and carefully circumscribed in the relevant texts. However, the present BIT grants no such right.[320]

402. As to the content of Article 25 of the ILC Draft Articles, BG submitted that Argentina bears the onus of proving that all requirements of the doctrine of necessity as reflected in Article 25 of the ILC Draft Articles have been met without interruption from January 2002 (when the Emergency Law was enacted) to the present day.[321]

403. In focusing on specific questions with regard to the requirements of Article 25 of the ILC Draft Articles, BG contended that Argentina is debarred from invoking Article 25 of the ILC Draft Articles because it failed to

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320. Post-Hearing Brief, paragraphs 302-309.

321. Reply, paragraphs 430 *et seq.*; Post-Hearing Brief, paragraph 310.

satisfy the general requirements of the second paragraph of this provision. Given the object and the purpose of the BIT, Argentina may not dispose of guarantees freely extended to attract BG's long-term investment on the argument that certain risks have materialized, when the very purpose of the guarantees was to transfer the associated risks to Argentina.[322]

404. Further, BG contended that Argentina contributed to its economic crisis. BG submitted that the evidence shows that Argentina's crisis was largely brought about by successive government failures to address chronic and serious structural economic problems. Relying, *inter alia*, on Professor Roubini's expert report and an IMF study, BG submitted that several endogenous causes contributed to Argentina's crisis, highlighting fiscal problems and labor-market "rigidities". According to the IMF study, for instance, the principal causes for the crisis were home-grown and the "*chief locus of vulnerability [of the Argentine economy] was the increase in public-sector indebtedness.*"[323]

405. BG also took exception with Argentina's understanding of Article 25(1)(a) of the ILC Draft Articles. Specifically, BG disagreed with Argentina's assertion that the words "the only way" are not to be read on their face but should be interpreted as importing a test of "proportionality and rational alternatives". In BG's view the words "the only way" are clearly designed to discourage abuse of the doctrine of necessity. BG

322. Reply, paragraphs 441-447.

323. Post-Hearing Brief, paragraphs 313-315.

further stated that Argentina's reading of Article 25(1)(a) of the ILC Draft Articles confirms the risk of abuse of the doctrine of necessity historically expressed by the U.K.. BG contended that the findings of an ICSID tribunal and the ICJ confirm the only interpretation that is consistent with the express language, negotiating history, and legislative intent of Article 25(1)(a) of the ILC Draft Articles. In any event, BG indicated that the "*pesificación*" and freezing of MetroGAS' tariffs fail Argentina's proportionality test.[324]

406. Finally, BG contended that Argentina was unable to prove the "grave and imminent peril" that allegedly forced Argentina to take the measures it took. Argentina's economic difficulties, acute as they were from December of 2001 to January of 2002, never mounted to a "grave and imminent peril" to an "essential interest" of the Argentine State within the meaning of Article 25(1)(a) of the ILC Draft Articles as illustrated by the fact that: (i) the institutions of Government continued to operate at all times in accordance with the Constitution; (ii) the GDP per capita on purchasing power parity terms remained the highest in Latin America, according to the IMF; and (iii) since May 2002 the economic indices have reached historic records surpassing pre-crisis levels, particularly in the case of GDP and unemployment. It is thus not possible to argue that an "economic crisis" continues to exist in Argentina and consequently Argentina cannot invoke necessity to excuse the measures it adopted.[325]

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324. Post-Hearing Brief, paragraphs 316-319.

325. Reply, paragraphs 453-463; Post-Hearing Brief, paragraphs 320-325.

Appendix D

2. The Tribunal's Findings

407. In the Tribunal's view, Argentina's defense relating to Article 25 of the ILC Draft Articles fails whether the Tribunal rejects or accepts the application of this provision.

408. Article 25 may relate exclusively to international obligations between sovereign States. From this perspective, Article 25 would be of little assistance to Argentina as it would not disentitle BG, a private investor, from the right to compensation under the Argentina-U.K. BIT.

409. Furthermore, the Commentary to the ILC Draft Articles indicates that a defense based on necessity is precluded "*where the international obligation in question explicitly or implicitly excludes reliance on necessity.*"[326] It can be argued that the Argentina-U.K. BIT implies such an exclusion. Thus, Argentina would not be entitled to invoke necessity to unilaterally revoke vested rights (*e.g.*, a dollar denominated tariff and economic equilibrium) designed precisely to operate in situations where a run on the currency would lead to a situation of necessity. There is no question that Argentina is entitled to adopt such measures as it deems appropriate to emerge from the state of emergency. However, it remains obligated to pay compensation. This is one view as to how bilateral

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326. Exhibit JL-358 (United Nations Report of the International Law Commission, 53rd session (2001), A/56/10 at p. 204).

investment treaties operate to induce foreign investment. Assuming that necessity were to justify some fair and non-discriminatory measure by Argentina, an obligation to compensate would still obtain by virtue of the BIT.[327]

410. In any event, even if the Tribunal were to apply Article 25,[328] it must be recalled that this "*is a most exceptional remedy subject to the very strict conditions because otherwise it would open the door to elude any international obligation*".[329] The tribunal in *LG&E* said it appropriately:

> The concept of state of necessity and the requirements for its admissibility lead to the idea of prevention: the State covers itself against the risk of suffering certain damages. Hence, the possibility of alleging the state of necessity is closely bound by the requirement that there should be a serious and imminent threat and no means to avoid it. Such circumstances, in principle, have been left to the State's subjective appreciation, a conclusion accepted by the International Law Commission. Nevertheless, the Commission was

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327. Certainly, where the bilateral investment treaty at hand contains an exculpatory provision and such provision finds application, compensation is not payable to the extent that such provision exonerates that party from liability.

328. Dismissing BG's allegation that the U.K. has always been a "*persistent objector*" to this provision (Post-Hearing Brief, paragraphs 296-301).

329. *Enron* (paragraph 304).

> well aware of the fact that this exception, requiring admissibility, has been frequently abused by States, thus opening up a very easy opportunity to violate the international law with impunity. The Commission has set in its Draft Articles on State Responsibility very restrictive conditions to account for its admissibility, reducing such subjectivity.[330]

411. The Tribunal does not believe that Argentina has met the "very restrictive conditions", given that measures adopted by Argentina included: (i) luring BG and other investors to accept a temporary suspension of the dollar denominated tariff and the adjustment mechanism by indicating that the measures would be temporary; (ii) threatening companies that resorted to arbitration; (iii) attempting to force investors which commenced arbitration to withdraw these proceedings as a condition to negotiations; and (iv) setting up a mechanism for the revision of the concessions that was never intended to restore the conditions of Argentina's initial representations.

412. Accordingly, whether the Tribunal accepts or

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330. *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v The Argentine Republic* (*LG&E*) (ICSID Case No. ARB/02/1) Decision on Liability dated 3 October 2006 (paragraph 248). The tribunal in LG&E did not rely on the ILC Draft Articles for concluding that Argentina can invoke state of necessity. Instead, that tribunal relied on Article XI of the Argentina-U.S. BIT, a provision which, as noted above, does not exist in the Argentina-U.K. BIT.

rejects the application of Article 25 of the ILC Draft Articles, the result is the same: Argentina may not invoke the "state of necessity" doctrine under customary international law to excuse liability for breach of Article 2.2 of the Argentina-U.K. BIT, or its obligation to pay compensation under the treaty.

X. Damages

413. Considering the Tribunal's findings above that Argentina has breached the BIT with respect to the standard of fair and equitable treatment and by adopting unreasonable measures under Article 2.2 of the BIT, the Tribunal now turns to: (i) the appropriate standard for determining damages; and (ii) the quantification of any such damages.

414. Claimant seeks: "*. . . full compensation for Argentina's breaches of the Treaty, which amounts to the loss in the fair market value of its investment in MetroGAS caused by the Measures.*"[331]

415. Claimant's expert, Mr. Wood-Collins, applied a discounted cash flow (DCF) methodology to calculate "*. . . that the Measures have reduced the value of BG's investment in MetroGAS as at 1 January 2002 by US$238.1 million.*"[332] This is the amount of damages sought by Claimant for the alleged violation by Argentina of Article 2.2 and/or Article 5.1 of the Argentina-U.K. BIT.

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331. Post-Hearing Brief, paragraph 327.

332. Wood-Collins Report, paragraph 1.7.

Appendix D

416. Argentina took the position that:

a) any liability is excused by "unforeseeable changed circumstances" (*teoría de la imprevisión*) under Article 1198 of the Argentine Civil Code, an issue already addressed by the Tribunal in Chapter V above;

b) the renegotiation process would yield such restitution as BG may be entitled to;[333]

c) BG is not entitled to full reparation;[334] and

d) the Wood-Collins report is flawed.[335]

417. The Tribunal acknowledges that MetroGAS may wish to make its peace with Argentina in the context of the domestic renegotiation process. This, however, has not occurred. This Tribunal continues to be seized in this arbitration with a mandate under the Argentina-U.K. BIT to determine the standard and quantum of damages to which BG might be entitled.

418. The Tribunal has concluded that Argentina did not breach Article 5 of the BIT and so this award deals only with reparation for the breach of Article 2.2 of the BIT.[336]

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333. *Alegato Final*, paragraph 559.

334. *Alegato Final*, paragraph 567.

335. *Alegato Final*, paragraphs 571-591.

336. As found by the Tribunal in Sections A and C of Chapter VIII of this award.

Appendix D

A. Standard

419. Unlike Article 5 (Expropriation), Article 2 of the Argentina-U.K. BIT does not provide a standard for compensation. Claimant relied on international law and the awards of prior tribunals in support for its position that it is entitled to the fair market value of its investment in MetroGAS.

420. BG argued that the reparation standard for expropriation set out in Article 5 of the Argentina-U.K. BIT applies equally to a breach of Article 2.2 of the treaty. BG found support for the automatic extension of the standard of Article 5 in *CMS v Argentina*. The argument appears as follows in BG's Post-Hearing Brief (footnotes omitted):[337]

> Article 5(1) of the Treaty defines such compensation in the event of an expropriation as the genuine, or fair market, value of the investment, immediately before the expropriation, plus interest until the date of payment. The Treaty contains no such provision for compensation payable in respect of a breach of Article 2(2). However, when faced with a similar case of cumulative breaches of treaty, the tribunal in CMS v Argentina resorted to the same standard of "fair market value" to determine the compensation due, noting that:
>
> "while this standard figures prominently in respect of expropriation, it is not excluded in other cases

337. Post-Hearing Brief, paragraph 331.

where the effect of the breach results in important long term losses."

421. This reasoning is scant. In fact, principles of treaty hermeneutics militate for the conclusion that one should not read into Article 2.2 of the BIT a standard which Argentina and the U.K. expressly confined to Article 5 of the BIT.

422. For other reasons, however, "fair market value" can be relied upon as a standard to measure damages for breach of the obligation to accord investors treatment in accordance with Article 2.2 of the BIT. While the Tribunal is disinclined to automatically import such standard from Article 5 of the BIT, this standard of compensation is nonetheless available by reference to customary international law.

423. BG's analysis of international law focuses on the principle established in 1928 by the Permanent Court of International Justice in the *Case Concerning the Factory at Chorzów.*[338] This matter addressed the issue of compensation for the expropriation of a nitrate factory at *Chorzów* in Upper Silesia.

424. In its decision on jurisdiction of 26 July 1927, the Permanent Court found that reparation is due for failure to apply a convention even where the convention itself is

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338. Exhibit JL-26 (*Case Concerning the Factory at Chorzów (Claim for Indemnity) (Germany v Poland), Factory at Chorzow,* Judgment on the Merits, 13 September 1928, PCIJ Series A, No. 21). Post-Hearing Brief, paragraph 330.

silent on the issue:[339]

> It is a principle of international law that a breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.

425. The Permanent Court elaborated further on the standard of reparation in adjudicating the merits of the dispute on 13 September 1928:[340]

> The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if the act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in

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339. *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Germany v Poland)*, Jurisdiction, 26 July 1927, PCIJ Series A, No. 9, p. 21.

340. Exhibit JL-26, p. 47.

> place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

426. As stated above, *Factory at Chorzów* is also about expropriation. However, its vitality was energized and its scope broadened beyond the law of takings by Article 31 of the ILC Draft Articles:[341]

> 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

427. Under this rule, which seeks to codify customary international law, the obligation of the responsible State to make full reparation relates to the "*. . . injury caused by the internationally wrongful act.*" The injury, as stated by paragraph 2 of Article 31, includes any material damage caused by the wrongful act. Material damage here "*. . . refers to damage to property . . . which is assessable in financial terms.*"[342]

428. The damage, nonetheless, must be the consequence

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341. Exhibit JL-482. (James Crawford, "The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries", Cambridge University Press, 2002)

342. Exhibit JL-482, *cit*, p. 202.

or proximate cause of the wrongful act.[343] Damages that are "*too indirect, remote, and uncertain to be appraised*" are to be excluded.[344] In line with this principle, the Tribunal would add that an award for damages which are speculative would equally run afoul of "full reparation" under the ILC Draft Articles.

429. The Tribunal will be guided by these principles. Provided that the damage is not speculative, indirect, remote or uncertain, the Arbitral Tribunal may have recourse to such methodology as it deems appropriate in order to achieve the full reparation for the injury caused to BG by Respondent's breach of Article 2.2 of the Argentina-U.K. BIT.

B. Calculation

430. BG's expert Mr. Wood-Collins:

a) assessed the loss in the fair market value of BG's investment in MetroGAS as at 1 January 2002;

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343. United States-Germany Mixed Claims Commission, Administrative Decisions No. II, R.I.A.A., vol. VII, p. 23 (1923) (quoted by James Crawford in Exhibit JL-482; "The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries", Cambridge University Press, 2002, note 488).

344. *Trail Smelter* arbitration, R.I.A.A., vol. III, p. 1931 (1938, 1941), at p. 1931 (quoted by James Crawford in JL-482; "The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries", Cambridge University Press, 2002, note 489).

b) adjusted the result of (a) above to account for the part of the loss which might be borne by the creditors of GASA and calculated BG's "historical loss" for the period of January 2002 to December 2005.[345]

431. The Tribunal now turns to these calculations.

1. The GASA Debt Restructuring

432. As indicated above, GASA owns 70% of MetroGAS and BG owns 54.7% of GASA. Thus, BG's share of MetroGAS owned through GASA is 38.3%. Combined with the 6.8% of MetroGAS that BG owns directly, BG's share of MetroGAS is 45.1%.[346]

433. At the time that the Emergency Law was promulgated, GASA had US$70 million in outstanding debt. This debt was purchased in 2004 and 2005 by two investment funds, Ashmore and Marathon. On 7 December 2005, GASA entered into an agreement with the Ashmore and Marathon Funds to restructure its debt.[347]

434. Pursuant to this agreement, GASA's debt was to be cancelled in exchange for: (i) the issue by GASA and/or transfer by its shareholders to Ashmore Funds of 30% of GASA's shares; (ii) the transfer to Ashmore

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345. The Post-Hearing Brief updates the calculation to 1 September 2006 (paragraph 456).

346. 45.11% more exactly.

347. Exhibit J-604. "Ashmore Funds" and "Marathon Funds" are terms defined in the Master Restructuring Agreement.

Funds of approximately 3.65% of shares in MetroGAS held by GASA; (iii) the transfer to Marathon Funds of approximately 15.35 % of shares in MetroGAS held by GASA. After the restructuring, BG's investment in MetroGAS would be reduced by 18.8%, from 45.1% to 26.3%.

435. This transaction is subject to approvals in Argentina. Section 4.2(i) of the Master Restructuring Agreement provides that:

> 4.2 Conditions Precedent to the Consummation of the Restructuring. The Closing is subject to the satisfaction or waiver of the following conditions:
>
> [. . .]
>
> . . . Governmental Approvals. (i) The Company and each of the Creditors shall have received a certified copy of each authorization, consent, order, approval, license, ruling, permit, exemption, filing or registration specified on Schedule 1 hereto. . . . (ii) The New GASA By-Laws and the issuance by the Company of New Equity shall have been approved by the Comisión Nacional de Valores.

436. It is a matter of record that not all required approvals have been issued by the Argentine authorities and that none have been waived. The transactions contemplated by the Master Restructuring Agreement have therefore not closed and the restructuring of the GASA debt has not been consummated. In addition, the creditors are now entitled to terminate under Section 7.2 of the Master Restructuring Agreement:

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7.2. Termination.

[. . .]

b) Termination by the Creditors. Each of the following events and circumstances shall be a "Creditor Event of Terminator" hereunder:

[. . .]

(vii) The Closing shall not have occurred by one year from the Execution Date [7 December 2006] other than as a result of non-compliance by a Creditor with its obligations hereunder.

437. Under the circumstances, this award cannot assume that the necessary approvals will be secured and there is no guarantee that the Master Restructuring Agreement will remain in force. The Arbitral Tribunal will therefore proceed on the basis that no restructuring of the GASA debt has been successfully completed.

2. Loss in Fair Market Value

438. Using DCF analysis, Mr. Wood-Collins valued BG's 45.1% investment in MetroGAS immediately before and after promulgation of the Emergency Law.[348] The

348. Although Mr. Wood-Collins refers to "With Measures" and "Without Measures" scenarios, his "Without Measures" valuation does not consider any of the pre-Emergency Law measures listed in his Letter of Instruction (Annex A, Wood-Collins Report).

difference between the two valuations, adjusted to consider GASA debt, yields the following result:[349]

Damages to BG's investment in MetroGAS as at 1 January 2002
Total Loss at 1 January 2002

Future value of BG's MetroGAS shares		
Without Measures	US$277.7 m	
With Measures	US$2.3 m	
Damage		US$275.4 m
GASA adjustment		
Without Measures (Note 1)	(US$38.3 m)	
With Measures (Note 2)	(US$1.0 m)	
Impact of damage		(US$37.3 m)
Total BG interest in MetroGAS on 1 January 2002		
Without Measures	**US$239.4 m**	
With Measures	**US$1.3 m**	
Damage		**US$238.1 m**

Notes
1. Cost of discharging BG's 54.7% share of GASA's US$70.0 m debt.
2. Cost of reducing BG's share in MetroGAS from 45.1% to 26.3%.

349. Table 1 of the Wood-Collins Report, p. 2.

439. This Tribunal has reached the conclusion that the Wood-Collins Report leads to a result which is uncertain and speculative. Specifically, the Tribunal is not persuaded by Mr. Wood-Collins' US$1.3 million valuation of BG's investment in Argentina in his "With Measures" scenario.

440. The Wood-Collins Report dismisses valuations of US$21.3million and US$18.8 million with little explanation.[350] More importantly, during testimony, Mr. Wood-Collins failed to satisfactorily reconcile his valuation of US $1.3 million with the implied value of the Ashmore/Marathon transaction, whereby US$38.2 million of debt was cancelled in exchange for an 18.8% interest in MetroGAS.[351] Regardless of the motivations of these funds, BG was willing to relinquish an 18.8% indirect interest in MetroGAS in exchange for a US$38.2 million write-off. This transaction would result in a post-Emergency Law value of BG's 45.11% interest in MetroGAS of US$91,825,244.15.[352] In the Tribunal's view this transaction provides an objective indication of the value of BG's investment after the Emergency Law.

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350. Wood-Collins Report, paragraphs L.27 and L.28, p. 104.

351. Tr. Wood-Collins 1265:13 to 1279:16, 1291:13-1293:13.

352. (1) $70,000,000 (BG's share of the GASA debt) x 54.67% (BG's ownership in GASA) = $38,269,000; (2) $38,269,000 (value to BG of cancellation of its share of the GASA debt) / 18.8% (capitalization of the GASA debt to Ashmore and Marathon) = $203,558,510.64; (3) $203,558,510.64 (total implicit value of MetroGAS) x 45.11% (total BG interest in MetroGAS) = $91,825,244.15

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441. The record also includes evidence of a transaction involving an interest in MetroGAS before the enactment of the Emergency Law.[353] Mr. Wood-Collins considered this transaction:[354]

> 4.22 On 12 July 1998, Perez Companc sold 25% of GASA for US$75 million. This implies that 100% of GASA was worth US$300 million. At that time GASA had debts of US$130 million and its sole asset was 70% of the shares of MetroGAS. As such, those shares in MetroGAS must have been valued at US$430 million.
>
> 4.23 Consequently, 100% of the MetroGAS shares must have been valued at US$614.3 million and therefore BG's 45.1% share of MetroGAS had an implied value of US$277.0 million.

442. Considering that BG's exact total (direct and indirect) ownership interest in MetroGAS is 45.11%, the implied value of such interest is actually US$277,110,730. It is the Tribunal's view that this is also a better proxy of the value of BG's investment before promulgation of the Emergency Law.

443. Consequently, the Tribunal's calculations based on actual transactions yield the following damage to BG's investment:

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353. Exhibit J-183.

354. Wood-Collins Report, Section 7, pp. 34 and 35 (footnotes omitted).

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Without Measures	US$277,110,730.00
With Measures	US$91,825,244.15
Damage	US$185,285,485.85

444. Argentina shall thus pay BG damages in the sum of US$185,285,485.85.

445. In its Reply, BG articulated its prayer for damages as follows:[355]

> (. . .) In view of the foregoing, BG requests that the Tribunal:
>
> (. . .)
>
> (d) Order that Argentina compensate BG in the sum equivalent to $238.1 million, plus interest at the average interest rate applicable to US six month certificates of deposit, compounded semi-annually;
>
> (. . .)

355. Reply, paragraph 535.

Appendix D

446. It is noteworthy that BG's Reply does not include an independent claim for historical loss. In its Post-Hearing Brief, BG further stated the following with respect to historical loss:[356]

> (. . .) the historical loss forms an important component of BG's total loss, and has not been challenged.

447. Thus, because the Tribunal has already adjudicated BG's claim as articulated, there is no need for the award to independently address historical loss. Nonetheless, to the extent that BG's pleadings could be interpreted as asserting an independent claim for historical loss, the Tribunal records that there is no support for any such claim.

448. Mr. Wood-Collins' calculation of historical loss results from certain projections prepared by MetroGAS in September of 2001 (the MetroGAS 2001 Projections). The date of these projections is unclear. Claimant stated that they were prepared by MetroGAS on 21 September 2001.[357] Mr. Wood-Collins dates them on 27 September 2001.[358] However, the actual "MetroGAS spreadsheet" that Mr. Wood-Collins used as a source for his calculations is not on the record.

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356. Reply, paragraph 535.

357. Post-Hearing Brief, footnote 473.

358. Wood-Collins Report, Annex E.

Appendix D

449. The MetroGAS 2001 Projections as presented by Annex E of the Wood-Collins Report are oblivious to the economic crisis that preceded the measures adopted by Argentina in January of 2002. Annex E projects a historical spike in the payment of dividends by MetroGAS (*i.e.*, over US$280 million for the 2002-2005 period)[359] precisely at a time (September 0f 2001) where internal and external shocks rendered the Argentine economy particularly vulnerable. As indicated in paragraph 54 of this award, Argentina could not address the combined effect of these shocks through exchange rate or monetary policies.

450. This is a fact that the business community could not ignore even in the absence of the measures that Argentina adopted a few months later. The Tribunal recalls here that the MetroGAS 2001 Projections were prepared by MetroGAS at a time when the adjustment of tariffs for US inflation had already been suspended and was subject to challenge before the Argentine courts.

451. From a legal perspective, there is no evidence on the record of a dividend policy approved pursuant to the corporate procedures set out in the By-Laws of MetroGAS.[360]

452. For these reasons, to the extent that Claimant has

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359. These payments also exceed the 95% dividends policy adopted by MetroGAS in its "2001 Plan Assumptions" set out in Exhibit CRA-10 of the Wood-Collins Report.

360. Exhibit J-117.

made an independent claim for historical loss, the Tribunal finds that it is not reasonable to rely on the MetroGAS 2001 Projections in support for any such claim. In addition, the Tribunal notes that implicit in the valuation of the Pérez Companc and Ashmore/Marathon transactions discussed above is an expectation of cash flow to equity.

453. For these reasons, the Tribunal does not enter any decision for payment of damages in excess of the sum set out in paragraph 444 above.

C. Interest

454. This Tribunal agrees with BG that interest at a reasonable commercial rate is appropriate to compensate BG in full for Argentina's breach of the Argentina-U.K. BIT. The Tribunal further finds, however, that interest should run from 6 January 2002, the date of promulgation of the Emergency Law, and not from 1 January 2002, as argued by BG, until payment of this award by the Republic of Argentina.

455. The rate of interest is a function of the instrument in which BG could have reasonably invested funds available to it on 6 January 2002. The Tribunal agrees with Mr. Wood- Collins that investment in a highly secure, dollar denominated, liquid and short-term instrument would have enabled BG to rapidly redeploy its funds.[361] The Tribunal further accepts that US Treasury six-month certificates of deposit meet these criteria and that interest should be

361. Wood-Collins Report, paragraph 8.2.

compounded semi-annually. The Tribunal finally notes that Argentina did not address BG's claim to interest or the reasonableness of assuming US Treasury certificates of deposit, and it did not challenge the authorities relied upon by BG in support for its position on compound interest.[362] The Tribunal finds that these authorities are persuasive.

456. The Tribunal notes in particular that the standard of "full reparation" articulated in Section X.A above would not be achieved if the award were to deprive Claimant of compound interest. If invested in January of 2002, the sums awarded would have earned compound interest – investment in six month certificates of deposit involves earning compound interest.

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362. Exhibit JL-190 (FA Mann, "Compound Interest as an Item of Damage in International Law" (1988), 21 *University of California Davis Law Review* 577); Exhibit JL-268 (JY Gotanda, "Awarding Interest in International Arbitration", (1966), 90 *American Journal of International Law* 40); Exhibit JL-350 (*Metalclad Corp v The United Mexican States*, Case No ARB(AF)/97/1, Award of 30 August 2000, paragraphs 128 and 131); Exhibit JL-328 (*Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Award of 13 November 2000,, paragraphs 96-97); Exhibit JL-322 (*Compañía del Desarrollo de Santa Elena, SA v The Republic of Costa Rica*, Case No ARB/96/1, Final Award of 17 February 2000, paragraphs 97-107); Exhibit JL-331 (*Wena Hotels Ltd v A RA-t Republic of Egypt*, ICSID Case No ARB/98/4, Award of 8 December 2000, paragraphs 128-130); Exhibit JL-464 (*CMS Gas Transmission Company v the Argentine Republic*, ICSID Case No ARB/01/8, Award of 12 May 2005, paragraph 471).

457. For these reasons, the Tribunal finds that Respondent shall pay Claimant interest on the sum of US$185,285,485.85 from 6 January 2002 until the date of payment, at the average interest rate applicable to US six-month certificates of deposit, compounded semi-annually.

XI. Costs

458. BG brought a claim for US$238.1 million plus interest. This award finds for BG in the amount of US$185.3 plus interest. BG therefore prevailed with respect to 78% of the amount it claimed.

459. As to jurisdiction and admissibility, while this Tribunal has entered an affirmative finding on jurisdiction, it also concluded that BG does not have standing to bring "claims to money" and "claims to performance", or to assert other rights, derived from the MetroGAS License (see paragraph 217 above).

460. Under the circumstances and pursuant to Article 40 of the UNCITRAL Rules, the Tribunal finds that it is reasonable for Argentina to bear 70% of: (i) the costs of the arbitration as fixed in paragraph 462 below; and (ii) BG's legal fees and expenses.

461. Pursuant to Article 38 of the UNCITRAL Rules, the fees of the Tribunal are hereby fixed as follows:

a) Guillermo Aguilar Alvarez,

US$323,168.13

b) Albert Jan van den Berg,

US$328,308.14

c) Alejandro Garro,

US$197,095.17

462. In addition, the expenses of the Arbitral Tribunal amount to US$261,907.82. This sum includes the fees and expenses of the Administrative Secretary, the costs of translating the award, and the administrative fee of $59,312.50 paid to ICSID as custodian of the funds deposited by the Parties pursuant to Article 41 of the UNCITRAL Rules (Section 16 of Procedural Order No. 2). Moreover, the costs of the Preliminary Conference and of the evidentiary hearing are US$126,020.74. This yields a total for the costs of the arbitration, including Tribunal fees and expenses, and costs of the Preliminary Conference and evidentiary hearing, of US$1,236,500.00.

463. The Parties paid the deposit fixed by the Tribunal to cover its fees and expenses (Article 41 of the UNCITRAL Rules) as follows:

a) Claimant:

US$618,250.00

b) Respondent:

US$618,250.0

Total: **US$1,236,500.00**

464. There was a shortfall for payment of arbitral fees after 16 July 2006, caused by events set out in the Tribunal's letter to the Parties of 25 September 2007. All three arbitrators and the Tribunal's Administrative Secretary have waived a portion of their fees in order not to burden the Parties with a request for supplemental payments. Accordingly, nothing remains payable.

465. In addition, BG submitted a claim for legal fees and expenses in the sum of US$624,390.00[363] and GB£3,448,773.00. In the Tribunal's view, these sums are reasonable.

466. Accordingly, to comply with the Tribunal's order as set out in paragraph 460 above, Respondent shall pay Claimant:

a) the sum of US$247,300.00 for costs of the arbitration as fixed in paragraph 462 above; and

b) the sum of US$437,073.00 and GB£2,414,141.10 as legal fees and expenses incurred by Claimant in this arbitration.

XII. Decision

467. For the foregoing reasons, the Arbitral Tribunal unanimously renders the following award:

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363. This comprises the amounts set out in paragraphs 461 to 464, as updated in BG's costs submission of 4 June 2007.

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(1) Subject to decision number (2) below, this Arbitral Tribunal has jurisdiction with respect to all of BG Group Plc.'s claims which are admissible in this arbitration.

(2) BG Group Plc. does not have standing to seize this Tribunal with "claims to money" and "claims to performance" under the Argentina-U.K. BIT, or to assert in this arbitration any other right derived from the MetroGAS License.

(3) The Republic of Argentina breached Article 2.2 of the Argentina-U.K. BIT.

(4) The Republic of Argentina shall pay BG Group Plc. the sum of US$185,285,485.85 (one hundred and eighty five million two hundred and eighty five thousand four hundred and eighty five US dollars and 85/100) for damages to BG Group Plc.'s investment claimed in this arbitration.

(5) The Republic of Argentina shall pay BG Group Plc. interest on the sum set out in decision (4) above from 6 January 2002 until the date of payment, at the average interest rate applicable to US six-month certificates of deposit, compounded semi-annually.

(6) The Republic of Argentina shall pay BG Group Plc. the sum of US$247,300.00 for costs of the arbitration.

(7) The Republic of Argentina shall pay BG Group Plc. the sums of US$437,073.00 (four hundred thirty

seven thousand and seventy three US dollars) and GB£2,414,141.10 (two million four hundred and fourteen thousand one hundred and forty one British Pounds and 10/100) for legal fees and expenses incurred by BG Group Plc. in this arbitration.

(8) All other claims are rejected.

Done in Washington D.C., on 24 December 2007 in equally authoritative English and Spanish versions.

/s/
Albert Jan van den Berg
Arbitrator

/s/
Alejandro M. Garro
Arbitrator

/s/
Guillermo Aguilar Alvarez C.
President

APPENDIX E — ORDER DENYING REHEARING EN BANC, DATED MARCH 15, 2012

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-7021

REPUBLIC OF ARGENTINA,

APPELLANT

v.

BG GROUP PLC,

APPELLEE

September Term 2011

1:08-cv-00485-RBW

Filed On: March 15, 2012

BEFORE: Sentelle, Chief Judge, and Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Appendix E

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

OPPOSITION BRIEF

No. 12-138

In the Supreme Court of the United States

BG GROUP PLC,

Petitioner,

v.

REPUBLIC OF ARGENTINA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a federal court with jurisdiction over an application to vacate an arbitral award may, under *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995), independently decide whether there exists a valid and binding agreement to arbitrate, predicated on the terms of a bilateral investment treaty?

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STATEMENT OF THE CASE

In *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995), this Court established that the question whether a valid and binding agreement to arbitrate exists is generally one for the courts to decide, without any deference owed to the arbitrators' views. In the ruling below, for which BG Group PLC ("Petitioner" or "BG") now seeks review, the United States Court of Appeals for the District of Columbia Circuit (the "Court of Appeals") correctly applied that rule and properly concluded that there was no valid agreement binding Respondent, the Republic of Argentina ("Argentina"), to arbitrate.

Thus, this case concerns whether there was an agreement to arbitrate, and not, as BG and *amici* urge, compliance with conditions precedent or procedural time limits provided by an arbitration agreement whose existence and validity is conceded. Under the relevant bilateral investment treaty, Argentina offered to arbitrate disputes under prescribed terms only with investors who have already litigated in Argentine courts for a period of eighteen months or who have received a final decision from the Argentine courts but remain unsatisfied, whichever is earlier. Unless the investor, a third party beneficiary of the treaty, accepts the offer to arbitrate *according to the express terms of that offer*, no arbitration agreement can come into existence.

In this case, the Court of Appeals found that BG did not accept Argentina's offer, and therefore no agreement to arbitrate between BG and Argentina was ever formed. The Court of Appeals' decision is entirely

consistent with this Court's ruling in *First Options*, as well as with decisions from other circuits. The Court of Appeals' decision is also consistent with federal policy regarding arbitration as articulated by this Court under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (the "FAA"), which uniformly emphasizes that arbitration is, above all, a matter of contract, and seeks to ensure that no party is forced to arbitrate when it did not agree to do so. The Court should therefore deny BG's Petition for a Writ of Certiorari ("Petition" or "Pet.").

A. The BIT

The claim in this case is alleged to arise from the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments (the "BIT"). BIT, Arg.-U.K., Dec. 11, 1990, 1765 U.N.T.S. 33. While the general purpose of this and other bilateral investment treaties is to protect and promote foreign investment, that purpose is constrained "within the framework acceptable to both of the State parties." *Daimler Fin. Servs. AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, ¶ 161 (Aug. 22, 2012), *available at* http://italaw.com/sites/default/files/case-documents/ita1082.pdf.

The BIT's dispute resolution clause pertaining to foreign investors is contained in its Article 8. Article 8, however, is not a standard contractual arbitration clause, such as those present in the commercial agreements involved in most cases cited in the Petition, where commercial parties agree to arbitrate any and all disputes arising out of or relating to the agreement

between those parties. To the contrary, Article 8(1) of the BIT contains, first and foremost, an agreement to *litigate*:

> (1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled ***shall*** be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.

BIT, art. 8(1) (emphasis added). This provision thus sets forth in unambiguous terms the investor's binding obligation to litigate its disputes in the host state, *i.e.*, the state "in whose territory the investment was made."

Article 8(2) of the BIT likewise does not contain an agreement to arbitrate all disputes arising out of or relating to the BIT, but rather a unilateral offer by each of the two state parties, Argentina and the United Kingdom, to arbitrate with an investor of the other state according to the following terms:

> (2) The aforementioned disputes shall be submitted to international arbitration in the following cases:
>
> (a) if one of the Parties so requests, in any of the following circumstances:

> (i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;
>
> (ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;
>
> (b) where the Contracting Party and the investor of the other Contracting Party have so agreed.

BIT, art. 8(2).

Therefore, contrary to BG's contention, an investor in Argentina cannot accept Argentina's offer to arbitrate simply by "issu[ing] a demand for arbitration." Pet. 20 n.8. The BIT explicitly provides that any such dispute must be litigated in an Argentine court. An investor may arbitrate a dispute only if a separate arbitration agreement is formed in one of two ways. First, an investor can accept Argentina's unilateral offer to arbitrate according to the terms of Article 8(2)(a) of the BIT—that is, the investor must first litigate the dispute in an Argentine court, and that court must either (1) not have resolved the dispute within eighteen months, or (2) have issued a final decision but the dispute continues between the parties. Alternatively, the investor and Argentina can negotiate a mutually acceptable separate agreement to arbitrate as permitted by Article 8(2)(b). Only through one of those means can an agreement to arbitrate between

Argentina and the investor come into existence.[1] Even BG acknowledges that Article 8(2) of the BIT, alone, is *not* a binding arbitration agreement, but is instead a "standing offer from the State parties to arbitrate." Pet. 20 n.8.

B. The Arbitration

BG ignored the terms of Argentina's offer to arbitrate and never submitted its claims to an Argentine court, instead proceeding immediately to submit its claim for arbitration. Because the parties were not in agreement as to whether there was an agreement to arbitrate, let alone on procedure, the arbitration was conducted under Article 8(3) of the BIT pursuant to the United Nations Commission on International Trade Law Arbitration Rules (the "UNCITRAL Rules"). G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976). *See* Pet. App. 92a. By agreement of the parties, the seat of arbitration was Washington, D.C.

From the outset of the arbitration, Argentina objected to the jurisdiction of the arbitral tribunal (the "Tribunal") based on the fact that BG failed to first submit its dispute to an Argentine court as Article 8(1) of the BIT requires, and therefore there could be no

---

[1] The BIT does not, *per se*, impose a requirement that the investor first exhaust local remedies, as BG suggests. *See* Pet. 9, 22 n.9. Article 8(2) contains an offer by Argentina to arbitrate only disputes that have been first litigated in its courts for eighteen months, *regardless of whether a decision is reached*—that is, regardless of whether local remedies have, in fact, been exhausted.

agreement to arbitrate under Article 8(2).[2] Without denying the mandatory nature of the requirement to submit the dispute to Argentine courts, the Tribunal nevertheless found it had jurisdiction and rendered an award in favor of BG (the "Award").

C. Proceedings Before Federal Courts

Argentina filed a petition to vacate or modify the Award in the United States District Court for the District of Columbia, and BG filed a cross-motion to confirm the Award. The District Court denied vacatur and granted confirmation of the Award. *Republic of Argentina v. BG Grp. Plc*, 715 F. Supp. 2d 108 (D.D.C. 2010); *Republic of Argentina v. BG Grp. Plc*, 764 F. Supp. 2d 21 (D.D.C. 2011).

On Argentina's appeal, the Court of Appeals reversed the lower court and vacated the Award, finding that "BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration" (Pet. App. 19a), and that the Tribunal's decision to uphold jurisdiction had "ignore[d] the terms of the Treaty" and given no "regard to the contracting parties' agreement." Pet. App. 2a. In reaching its conclusion, the Court of Appeals found that "the 'parties would likely have

---

[2] It is well recognized that a party preserves its right to judicial determination of the absence of an agreement to arbitrate so long as it has made known its objection at the start of the arbitration. *See, e.g.*, *First Options*, 514 U.S. at 941, 946-47 (holding that existence of agreement to arbitrate was subject to independent review by the courts despite the fact that First Options had presented its objections to the arbitration panel).

expected a court' to decide arbitrability" because "there is no clear and unmistakable evidence . . . that the contracting parties intended an arbitrator to decide the gateway question." Pet. App. 15a (citing *First Options*, 514 U.S. at 944).

The Court of Appeals denied BG's petition for rehearing and rehearing en banc. After two extensions of time, BG filed the Petition with this Court.

REASONS FOR DENYING THE PETITION

The Petition does not satisfy the Court's criteria for *certiorari* review. The decision below correctly applied this Court's precedent, which provides that courts are entitled to decide without deferring to arbitrators whether a valid arbitration agreement exists. In addition, *certiorari* should be denied because this precedent is well settled and uniformly applied by the courts of appeals. Petitioner can suggest a split between the circuits only by mischaracterizing the issue presented by this case as one of conditions precedent contained in a valid arbitration agreement, notwithstanding the Court of Appeals' finding that no agreement to arbitrate exists in this case.[3] Finally, the

---

[3] The four *amicus* briefs that have been filed with the Court supporting the Petition suffer the same defect, among others. The first, filed by AWG Group Limited ("AWG *Amicus* Brief"), is nothing more than private pleading. AWG Group is currently engaged in an arbitration against Argentina that suffers a comparable jurisdictional deficiency, and its brief focuses on its own facts. Another brief comes from various professors and practitioners of arbitration law ("Professors and Practitioners *Amicus* Brief"), at least some of whom are counsel or associated

Court of Appeals' decision does not conflict with but rather supports the federal policy in favor of arbitration, as embodied in the FAA, which dictates that arbitration, first and foremost, is a matter of contract between the parties, and no party can be compelled to arbitrate if no valid arbitration agreement exists. Accordingly, there being no conflict with any of this Court's decisions, with any other court of appeals'

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with law firms that are counsel in arbitration or litigation against Argentina. Although *amici* United States Council for International Business ("USCIB *Amicus* Brief") and American Arbitration Association ("AAA *Amicus* Brief") are not as directly involved in this case, they both petition the Court in an effort to protect their own business interests.

More fundamentally, the arguments presented by all the *amici* arise from the false premise embedded in the question presented by BG—that this case is one of conditions precedent under a valid agreement to arbitrate—which renders their analysis largely irrelevant. Indeed, just one month before serving as co-author of the Professors and Practitioners *Amicus* Brief, Professor Bermann filed a petition in the Second Circuit which avers (contrary to the position intimated in the *Amicus* Brief) that until a recent Second Circuit decision, a consistent line of precedent across the circuits has "h[e]ld that the presumption laid down in *First Options* in favor of independent post-award review o[f] arbitral jurisdiction is not overcome merely because the arbitration agreement pursuant to which the arbitrator made his jurisdictional determinations" adopted the UNCITRAL, AAA, or ICC arbitration rules that refer the issue to the arbitrators in the first instance. Petition for Rehearing En Banc at 6 & n.1, *Thai-Lao Lignite (Thailand) Co. v. Gov't of the Lao People's Democratic Republic*, No. 11-3536 (2d Cir. July 27, 2012). Obviously, this is not the occasion to determine whether later decisions of the Second Circuit, unrelated to the current case, have created a split from what otherwise has been consistent application of *First Options*.

decisions, or with federal policy regarding arbitration, the Petition lacks merit and should be denied.

I. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS.

The Court of Appeals' decision that courts must independently determine whether an arbitration agreement exists between Argentina and BG is entirely in line with this Court's unambiguous precedent.

The BIT at issue in this case reflects an agreement between Argentina and the United Kingdom to "consent" to submit future investment disputes to arbitration, not in general, but in accordance with the terms of the BIT. The BIT provides "merely an *offer* to agree to arbitration . . . [that] is consummated as a binding obligation to arbitrate only with th[e] investor's acceptance of the offer." Christopher F. Dugan et al., *Investor-State Arbitration* 221 (2008). *See also Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 392 (2d Cir. 2011) (to form an agreement to arbitrate, one party must be a BIT signatory and the other must "consent to arbitration of an investment dispute *in accordance with the Treaty's terms.*") (emphasis added); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, ¶ 116 (Dec. 8, 2008), *available at* http://italaw.com/sites/default/files/case-documents/ita0907.pdf ("an investor . . . can accept the 'offer' only as so conditioned").

Accordingly, to create a binding agreement to arbitrate, an investor must first accept the offer the sovereign state actually made, according to its terms,

not a counter-offer the investor might wish to propose.[4] In this case, BG never accepted Argentina's offer to arbitrate as specified in Article 8(2), which was an offer only for disputes that have been litigated in an Argentine court for eighteen months, or for disputes that remain unresolved after a final judicial decision has been rendered, whichever is earlier. Accordingly, no agreement to arbitrate was ever created.[5]

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[4] Under *First Options*, whether a separate arbitration agreement was formed is a matter for contract law. *See First Options*, 514 U.S. at 940, 944 ("[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.").

[5] Several arbitral tribunals, interpreting treaties to which Argentina is party, have declined jurisdiction on this same basis. *See, e.g.*, *Daimler Fin. Servs. AG*, ICSID Case No. ARB/05/1, Award, ¶ 194 (the eighteen-month domestic courts provision "cannot be bypassed or otherwise waived by the Tribunal as a mere 'procedural' or 'admissibility-related' matter"); *ICS Inspection & Control Servs. Ltd. v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, ¶ 262 (Feb. 10, 2012) *available at* http://italaw.com/sites/default/files/case-documents/ita0416.pdf (the most recent instance of application by an arbitral tribunal of the BIT at issue here) ("the failure to respect the pre-condition to the Respondent's consent to arbitrate cannot but lead to the conclusion that the Tribunal lacks jurisdiction over the present dispute."); *Wintershall Aktiengesellschaft*, ICSID Case No. ARB/04/14, Award, ¶ 156 (because the claimant failed to comply with the local court litigation requirement, "the Tribunal has no competence to entertain the claim and to proceed with it on merits").

A. The Court Of Appeals' Decision Correctly Applied This Court's Holding In *First Options Of Chicago v. Kaplan.*

In *First Options* this Court addressed the question of "how a district court should review an arbitrator's decision that the parties agreed to arbitrate a dispute" and held that the answer turned on whether "the parties agree[d] to submit the arbitrability question itself to arbitration." 514 U.S. at 940, 943. Moreover, this Court cautioned lower courts "not [to] assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* at 944 (citations omitted). Absent such evidence, a court should decide the arbitrability question "independently." *Id.* at 943.

In this case, and as the Court of Appeals found, there is no "clear and unmistakable evidence" that Argentina intended to have an arbitral tribunal decide the question whether it agreed to arbitrate. To the contrary, the plain terms of Article 8(1) of the BIT make clear that disputes thereunder must be submitted first to litigation in an Argentine court, which will have the first opportunity to decide any issue in dispute between the parties. Absent a separate arbitration agreement between BG and Argentina, the possibility of arbitration does not even arise until eighteen months of court litigation have passed or the Argentine court has rendered a final decision unsatisfactory to the parties. BIT, art. 8(2)(a). Accordingly, the Court of Appeals' decision that, absent such "clear and unmistakable" evidence, the question of arbitrability is an independent question of law for

the court to decide (Pet. App. 15a) is a straightforward application of this Court's holding in *First Options*.

B. This Court's Decisions Regarding Procedural Prerequisites To Arbitration Are Inapplicable In The Absence Of A Valid Arbitration Agreement.

BG attempts to craft a conflict with this Court's precedent in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), and *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002)—both discussed in detail and distinguished by the Court of Appeals—by characterizing the issue presented in this case as one of compliance with a condition precedent to arbitration under a valid arbitration agreement, which it argues is a question for the arbitrators to decide. But BG has it wrong. This case is not about conditions precedent to arbitration, but, as discussed above, about whether there is a valid agreement to arbitrate between BG and Argentina, an issue to which neither *John Wiley* nor *Howsam* speaks at all. Moreover, on that issue, BG acknowledges, as it must, the well-settled principle that "absent contrary agreement, the 'question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the question of arbitrability, is an issue for judicial determination.'" Pet. 21 (quoting *Howsam*, 537 U.S. at 83, 85). *See also, e.g.*, Professors and Practitioners *Amicus* Brief 27-28 (when the "existence or validity of an arbitration agreement" is challenged, that "objection strikes at the very heart of the legitimacy of arbitration, namely the consent of the parties, and is, presumptively, for the courts to decide").

In *John Wiley*, the question presented was whether procedural requirements under a collective bargaining agreement had been met. 376 U.S. at 544. This Court concluded that "procedural questions . . . should be left to the arbitrator" but only "[o]nce it is determined . . . that the parties are obligated to submit . . . a dispute to arbitration." *Id.* at 557. The Court of Appeals correctly determined that the analysis in *John Wiley* is not applicable to this case because where the contracting parties are two sovereigns that "agree to require dispute resolution in a court prior to arbitration, and the aggrieved party initiating the dispute disregards the requirement, a fundamentally different question of arbitrability arises than that of the ignored informal resolution steps in *John Wiley*." Pet. App. 19a. That "fundamentally different question" is whether an arbitration agreement between the sovereign and the investor exists—recognizing that the investor is not a party to the underlying agreement (the BIT)—and not whether a procedural prerequisite of an existing agreement has been met.

Howsam is similarly inapplicable. *Howsam* involved the application of a six-year limitation period under the NASD arbitration rules. This Court found that "[t]he time limit rule closely resembles the gateway questions that this Court has found *not to be 'questions of arbitrability*.'" 537 U.S. at 85 (emphasis added) (citations omitted).[6] As this Court stated and the Court

---

[6] The Court of Appeals did not, as BG suggests (Pet. 25), read *Howsam* as being limited to rule-based conditions precedent. Rather, it distinguished *Howsam* based on the fact that Article 8 of the BIT suggests that the parties would have expected a court

of Appeals quoted, a court will decide the question of arbitrability where the

> contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.

Howsam, 537 U.S. at 83-84; Pet. App. 11a. In this case, the "'parties would likely have expected a court' to decide arbitrability" since "the gateway provision *itself* is resort to a court." Pet. App. 15a.

Accordingly, *John Wiley* and *Howsam* delegated to arbitrators questions of procedural arbitrability but not the fundamental question whether a party consented to arbitrate. Therefore, the Court of Appeals' decision in no way conflicts with this Court's precedent and the Petition does not warrant *certiorari* review.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

BG attempts to manufacture not just one but two circuit conflicts. Neither exists. First, because this case does not involve compliance with procedural

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and not an arbitrator to decide whether an agreement to arbitrate exists. Pet. App. 15a.

preconditions to an existing arbitration agreement, it does not conflict with decisions of other circuits holding that compliance with such procedural preconditions are for arbitrators to decide. Second, the Court of Appeals' decision does not conflict with decisions from the Second Circuit regarding the application of the UNCITRAL Rules because in this case the UNCITRAL Rules were never triggered and in any case do not foreclose judicial inquiry.

A. There Is No Conflict With The First, Sixth, Seventh, And Eighth Circuits.

BG relies on cases from the First, Sixth, Seventh, and Eighth Circuits that have all held that compliance with preconditions to arbitration are for arbitrators to decide. *See* Pet. 28-34. These decisions are all irrelevant, however, because as discussed above this case is not about preconditions to arbitrate, but about whether an agreement to arbitrate exists, an issue which these cases either do not address, or appropriately hold is for the courts, and not the arbitrators, to decide.

In *Lumbermens Mutual Casualty Co. v. Broadspire Management Services, Inc.*, 623 F.3d 476 (7th Cir. 2010), for example, the Seventh Circuit explicitly noted that the dispute in question (the adequacy of a party's disagreement notice) was for the arbitrators to decide because "there is no dispute as to the existence of an agreement to arbitrate . . . Instead, this is a procedural dispute over preconditions *to* that arbitration." 623 F.3d at 483. Similarly, in *JPD Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 390-91 (6th Cir. 2008), and in *Dialysis Access Center, LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 373, 375 n.8 (1st Cir. 2011), the parties did not

dispute whether a valid arbitration agreement existed (which they understood a court would decide), but whether the particular issue was within the scope of the agreed arbitration clause. The courts' holdings regarding the separate question of who should decide compliance with preconditions to a concededly valid arbitration agreement are irrelevant to the present case.

Finally, in *International Brotherhood of Electrical Workers, Local Union No. 545 v. Hope Electrical Corp.*, 380 F.3d 1084 (8th Cir. 2004), where the defendant actually contended that no arbitration agreement existed, the Eighth Circuit, consistent with *First Options* and with the decision of the Court of Appeals, held that "whether the parties had a valid arbitration agreement . . . [is] appropriate for judicial resolution." 380 F.3d at 1100 (citation omitted). Accordingly, the Court of Appeals' decision is not in conflict with the decisions from the First, Sixth, Seventh, and Eighth Circuits.[7] For this additional reason, the Petition should be denied.

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[7] In *Kemiron Atlantic, Inc. v. Aguakem International, Inc.*, 290 F.3d 1287 (11th Cir. 2002), which BG claims—together with the Court of Appeals' decision—contributes to a circuit split, the parties did not dispute the existence of a valid arbitration agreement. 290 F.3d at 1291. Thus, the Eleventh Circuit's decision as to the separate question of who should decide compliance with conditions precedent to arbitration is irrelevant to this case, and this case is not an appropriate vehicle to address the propriety of *Kemiron*'s resolution of that issue.

B. The Court Of Appeals' Decision Is Not Contrary To Second Circuit Decisions Involving The UNCITRAL Rules.

The Second Circuit, consistent with *First Options*, has held that a party is entitled to have "independent court review of a question of arbitrability unless there is clear and unmistakable evidence that the parties agreed to arbitrate that question." *Schneider v. Kingdom of Thailand*, No. 11-1458, 2012 U.S. App. LEXIS 16508, at *5 (2d Cir. Aug. 8, 2012); *see also Chevron*, 638 F.3d at 394-95. In addition, it has held that when the parties' arbitration agreement incorporates rules that empower the arbitrators to consider their own jurisdiction, as the UNCITRAL Rules do, such incorporation provides "clear and unmistakable" evidence of the parties' intent to delegate questions of arbitrability to the arbitrators precluding subsequent independent judicial review. *Schneider*, 2012 U.S. App. LEXIS 16508, at *9-13.

In *Chevron*, however, there was no question that the investor had accepted Ecuador's standing offer to arbitrate the dispute at issue and that a valid arbitration agreement between Chevron and Ecuador therefore existed. 638 F.3d at 392-93. Similarly, in *Schneider* the UNCITRAL Rules were adopted in the post-dispute Terms of Reference for the arbitration, in which the parties specifically empowered the tribunal to "consider . . . objections to jurisdiction." *Schneider*, 2012 U.S. App. LEXIS 16508, at *11. In contrast, in this case, as the Court of Appeals correctly found, because BG never accepted the offer to arbitrate actually made by Argentina, Article 8(3) of the BIT and its reference to the UNCITRAL Rules was never triggered. Pet. App. 14a. Accordingly, the Court of Appeals' finding that the BIT's

reference to the UNCITRAL Rules does not provide "clear and unmistakable" evidence of the parties' intent to delegate issues of arbitrability to arbitrators is not in conflict, direct or otherwise, with Second Circuit precedent, because the UNCITRAL Rules had not been incorporated into any valid agreement to arbitrate.

Moreover, Second Circuit precedent recognizes that an agreement to which an entity is not a party "does not evidence a 'clear and unmistakable' . . . intent . . . to arbitrate or to permit the arbitrator to decide the issue of arbitrability." *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 661-62 (2d Cir. 2005); *see also Republic of Iraq v. BNP Paribas USA*, 472 F. App'x. 11, 13 (2d Cir. 2012) (where "the arbitration clause does not clearly vest any right to invoke arbitration in a non-party," incorporation of the UNCITRAL Rules in the arbitration clause "does not afford [that party] the right to have arbitrators rather than a court determine the arbitrability of its dispute.").[8]

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[8] The Third Circuit has similarly held that when one party alleged that the agreement to arbitrate was forged, incorporation of similar rules (in that case the China International Economic and Trade Arbitration Commission Arbitration Rules) "is relevant only if the parties actually agreed to its incorporation. After all, a contract cannot give an arbitral body any power, much less the power to determine its own jurisdiction[, i]f the parties never entered into it." *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 288 (3d Cir. 2003).

Moreover, as Professor Bermann explained, until its recent decision, the Second Circuit never relied on the incorporation of the UNCITRAL Rules as a basis to preclude post-award judicial review of the existence of an agreement to arbitrate, but only as a basis to refer the matter to arbitration and decision by the

Accordingly, because the Court of Appeals' decision does not conflict with decisions of other circuits, the Petition does not warrant *certiorari* review and should be denied.

III. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH FEDERAL POLICY UNDER THE FEDERAL ARBITRATION ACT.

Finally, the decision below is fully concordant with federal policy towards arbitration. While BG relies on an "'emphatic federal policy in favor of arbitral dispute resolution,'" Pet. 16 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)), this Court has been equally "emphatic" that, at its core, "arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration." *First Options*, 514 U.S. at 943 (emphasis added). "After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms,' and according to the intentions of the parties." *Id.* at 947 (citations omitted). Any federal policy "in favor of" arbitration as a form of dispute resolution has no role in the absence of an agreement between the parties. *See, e.g., Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2859

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arbitrators in the first instance, subject to eventual judicial review. Petition for Rehearing En Banc, *Thai-Lao Lignite (Thailand) Co.*, No. 11-3536, *supra* note 3, at 6-7.

(2010) ("we have never held that [the federal policy favoring arbitration] overrides the principle that a court may submit to arbitration 'only those disputes . . . that the parties have agreed to submit' . . . Nor have we held that courts may use policy considerations as a substitute for party agreement.") (citation omitted). Thus, those who have not agreed to arbitrate cannot be compelled to do so, even in light of the "healthy regard [due to] the federal policy favoring arbitration." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also AT&T Techs. Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) (because "arbitration is a matter of contract," no arbitration may be compelled in the absence of an agreement to arbitrate); *Stolt-Nielson S.A. v. Animal Feeds Int'l Corp.*, 130 S. Ct. 1758, 1774 (2010) (the FAA's goal is to "give effect to the contractual rights and expectations of the parties") (citation omitted).

The Court of Appeals' decision is therefore consistent with the FAA's primary purpose of ensuring that arbitration agreements are enforced *according to their terms*. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011). BG attempts to avoid this obstacle by characterizing Argentina's unilateral offer to arbitrate, as embodied in the BIT, as an offer that can be accepted by an investor simply by submitting a demand for arbitration (Pet. 20 n.8), at which point the parties are bound by an arbitration agreement that, like many commercial arbitration agreements, "'provide[s] for negotiation, mediation or some other form of alternative dispute resolution as preliminary steps before arbitration.'" Pet. 18 (quoting Int'l Bar Ass'n, *IBA Guidelines for Drafting International Arbitration Clauses* ¶ 86 (2010)). But BG's characterization misses

the point. Here, the parties to the BIT are two sovereign states whose offers to arbitrate disputes with third-party investors were confined to their terms and were not open-ended. The Court of Appeals' decision that no arbitration agreement exists because BG did not accept the terms of Argentina's offer, and that the question of arbitrability is for the court to decide, is fully consistent with the FAA's purpose, and has nothing to do with multi-stage dispute resolution provisions contained in valid arbitration agreements.[9]

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[9] Although BG points to secondary sources to demonstrate that oftentimes arbitration is secondary to another form of alternative dispute resolution, it does not cite a single source saying that *litigation* (as opposed to mediation, negotiation, "or some other form of alternate dispute resolution") is a standard preliminary step in an already-concluded arbitration agreement. *See generally* Pet. 17-20. Further, its reliance on the *IBA Guidelines for Drafting International Arbitration Clauses*—which are intended to assist "in-house counsel and business lawyers ordinarily involved in contract drafting but unfamiliar with the complexities of arbitration"—for the interpretation of an international investment treaty such as the BIT is misplaced. Int'l Bar Ass'n, *IBA Guidelines for Drafting International Arbitration Clauses* at 2 (2010).

BG's contention that the Court of Appeals disregarded the Vienna Convention (Pet. 15) fares no better. The Court of Appeals followed the Convention's instructions under Article 31(1) that a treaty be interpreted in accordance with the ordinary meaning of its terms. *See* Pet. App. 7a n.1. Here, the BIT expressly states that disputes which have not been amicably settled "shall" be submitted to Argentine courts before there is an operative offer to arbitrate which the investor can accept. Accordingly, the Court of Appeals correctly relied on this mandatory and unambiguous language to conclude that there was no agreement to arbitrate this dispute.

The floodgates warnings of BG and its *amici* (Pet. 35; AAA *Amicus* Brief 8-9) are not borne out by the facts. BG freely chose to arbitrate in the United States nearly a decade after *First Options*, and indeed tried to impose arbitration on Argentina while not accepting the terms of Argentina's offer, notwithstanding that as a matter of United States arbitration law courts, and not arbitrators, would ultimately decide whether the parties were bound to arbitrate. Evidently, BG was not persuaded that this legal doctrine makes the United States inhospitable to arbitration. Indeed, it could scarcely have imagined otherwise, since the case would have been decided in exactly the same way had the issue arisen in the United Kingdom, BG's home state and the other signatory to the BIT at issue in this case. In *Dallah Real Estate & Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46 (appeal taken from Eng.), *available at* http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0165_Judgment.pdf, the UK Supreme Court refused to enforce an arbitral award after finding that the "issue regarding the existence of any relevant arbitration agreements falls to be determined by the Supreme Court as a United Kingdom court" which is "neither bound nor restricted" by the findings of the arbitral tribunal. *Id.* ¶¶ 12, 31.

Moreover, this issue does not arise frequently. According to one of the *amici*, there have been a total of only 236 reported arbitral awards under the more than 2700 investment treaties that have been adopted over the last 40 years. *See* Professors and Practitioners *Amicus* Brief 10-12 & n.4. Thus, "investment treaty arbitration still accounts for only a small proportion of the total arbitration market." PricewaterhouseCoopers,

International Arbitration: Corporate attitudes and practices 2008, PricewaterhouseCoopers, 3 (2008), *available at* http://www.pwc.co.uk/en_UK/uk/assets/pdf/pwc-international-arbitration-2008.pdf. Further, it remains the case that vacatur or enforcement proceedings are exceptional—according to a recent survey, such proceedings occurred with respect to only 11% of all arbitrations. *Id.* at 10. As a result, even if there were doubt as to the application of *First Options*—and there is not—this is not an issue prone to frequent litigation, nor is it one of any great urgency.

CONCLUSION

The Petition should be denied.

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REPLY BRIEF

RECORD
AND
BRIEFS

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IN THE

Supreme Court of the United States

BG GROUP PLC,

Petitioner,

v.

REPUBLIC OF ARGENTINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The D.C. Circuit held in this case that a court, rather than an arbitral tribunal, decides whether a party is excused from complying with a precondition to arbitration. As the petition demonstrated and the four *amicus* briefs confirm, that ruling conflicts with this Court's precedent and decisions of other circuits, and moreover is exceptionally important to arbitration. Indeed, that showing is so plainly correct that Argentina's argument against certiorari depends on its attempt to rewrite the ruling below as if the court instead held that the parties had never reached an agreement to arbitrate in the first place. Argentina's position is meritless for several reasons: (i) it misrepresents the D.C. Circuit's holding; (ii) it is inconsistent with the facts established in the record – *i.e.*, that BG accepted Argentina's arbitration offer; and (iii) even if the basis for the D.C. Circuit's decision had been the absence of an arbitration agreement, that decision would conflict with the decisions of other circuits. Because this case easily satisfies all of the criteria for this Court's review, the petition should be granted.

I. This Case Squarely Presents The Question Whether Courts Or Instead Arbitrators Decide Whether A Party Is Excused From Complying With A Condition Precedent To Arbitration.

Argentina's well-recorded and oft-demonstrated disdain for the judgments of U.S. courts, *see* Pet. 11, reaches new heights in the Opposition, which disavows the reasoning of the D.C. Circuit's ruling *in its favor*. According to Argentina, "this case concerns whether there was an agreement to arbitrate, and

not, as BG and *amici* urge, compliance with conditions precedent," BIO 1, because supposedly "the Court of Appeals found that BG did not accept Argentina's offer, and therefore no agreement to arbitrate between BG and Argentina was ever formed," *id.* That argument lacks the slightest merit.

1. Argentina did not even make this argument to the panel below, which did not adopt it. The D.C. Circuit instead recognized that the Treaty specifies litigation as a precondition to arbitration, and held that courts (not arbitrators) must decide whether a party is excused from complying. The court reasoned that "Article 8(2) sets the *conditions* by which such a dispute may be submitted to international arbitration." Pet. App. 3a (emphasis added). The court then recognized that "[t]he Treaty does not directly answer whether the contracting parties intended a court or the arbitrator to determine questions of arbitrability where the *precondition* of resort to a contracting party's court pursuant to Article 8(1) or (2) is disregarded by an investor." *Id.* 14a (emphasis added). The D.C. Circuit then held that a court, rather than an arbitrator, determines whether a party has complied with "a *precondition* to arbitration." *Id.* 15a (emphasis added).

Argentina's (mis)reading of the ruling below depends entirely on quoting the decision below out of context. Specifically, Argentina quotes the D.C. Circuit's statement that the arbitrators erred in not giving due "regard to the contracting parties' agreement," BIO 6, but it omits that the court actually referred to the "contracting parties' agreement establishing a *precondition* to arbitration," Pet. App. 2a (emphasis added). Argentina then

quotes the D.C. Circuit's statement that there was insufficient evidence to overcome the presumption "that the contracting parties intended an arbitrator to decide the gateway question," BIO 7, omitting the court's explanation in the next sentence of what that "question" constitutes:

> Because the Treaty provides that a *precondition* to arbitration of an investor's claim is an initial resort to a contracting party's court, and the Treaty is silent on who decides arbitrability when that *precondition* is disregarded, *we hold that the question of arbitrability is an independent question of law for the court to decide.*

Pet. App. 15a (emphasis added).

That holding is also of course what has driven the outpouring of *amicus* participation, including from "the world's largest provider of alternative dispute resolution services," AAA Br. 1, "the world's leading institution for international commercial arbitration," USCIB Br. 1, and numerous eminent authorities on arbitration practice, Professors & Practitioners Br.

2. The D.C. Circuit's understanding that the Treaty creates a precondition to arbitration – not merely "an agreement to *litigate*," BIO 3 – is also obviously right. Argentina cites the Treaty provision stating that a claim "shall be submitted" to its local courts. Treaty art. 8(1). But Argentina omits the more important point that the Treaty confers on every investor an absolute, unqualified right to have its claim arbitrated, even upon receiving an adverse court judgment. *Id.* art. 8(2)(a)(ii) (claim "shall be submitted to international arbitration" if after

judicial ruling "the Parties are still in dispute"). As Argentina concedes, the Treaty merely gives "an Argentine court . . . the first opportunity to decide any issue." BIO 11.

Only the arbitration – not the court ruling – is "final and binding." Treaty art. 8(4). That feature of the Treaty is essential to its *raison d'être*: to attract capital. Foreigners will not entrust multi-billion dollar investments to the potential biases of local courts.[1] Argentina's dismissive assertion that the question presented merely involves the economic interests of arbitral organizations, BIO 7-8 n.3, thus overlooks that the ruling below in fact threatens the interests of *sovereigns*, which equally "depend on this system . . . to provide an incentive for foreign investment." Professors & Practitioners Br. 14.

Argentina's contrary reading that the Treaty confers only an agreement to litigate is absurd. On that view, the host state could close its courts to claims under the Treaty or impose a massive financial penalty for bringing suit in court – hypothetical provisions similar to the measures

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[1] *See* USCIB Br. 18 ("It is generally highly unappealing, if not invidious, for international investors to be forced to submit disputes with a host State to that State's own courts."); *See* Marc J. Goldstein, *US Appellate Review of a BIT Award: Unmistakably Unclear*, Arbitration Commentaries, Jan. 18, 2012, http://arbblog.lexmarc.us/2012/01/us-appellate-review-of-a-bit-award-unmistakably-unclear/ ("Did the Argentine Republic foresee that it would be arguing this to an Argentine judge, from whom the UK investor would seek a pre-arbitral declaration of the investor's right to proceed with arbitration? Obviously not.").

actually adopted in this case. But because the investor would not have litigated its claim for the minimum eighteen months, Argentina would never have made an offer to arbitrate, leaving the investor with no recourse *at all*. Indeed, the ruling below provides a ready road map to any sovereign that seeks to strip investors of any right to relief: "The D.C. Circuit's decision will allow States to insist that investors comply with the local remedies precondition to arbitration while at the same time preventing them from doing so." USCIB Br. 20.

Argentina argues that its position is supported by arbitral rulings concluding that compliance with such a litigation precondition was not excused, BIO 10 n.5, while the *amici* cite arbitral rulings reaching a different result on different facts, AAA Br. 10-11 n.9; Professors & Practitioners Br. 24 n.27. But the relevant question here is not *how* the disputes over the arbitration preconditions were resolved, but *who* resolved them. In both sets of proceedings cited, it was the arbitrators – not courts – that decided the issue.

II. The Ruling Below Conflicts With The Precedent Of This Court And Of Other Circuits.

1. The petition established that by holding that courts presumptively resolve all questions of "arbitrability," Pet. App. 15a, the ruling below conflicts with this Court's holding that "issues of *procedural* arbitrability, *i.e.*, whether prerequisites such as time limits, notice laches, estoppel, and other *conditions precedent to an obligation to arbitrate* have been met, are for the *arbitrators* to decide," *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002)

(emphasis added; other emphasis omitted) (citation omitted); *see also John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964) (arbitrator must resolve "[d]oubts . . . [as to] whether [grievance procedures] have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate").

Argentina does not seriously defend the court of appeals' position that *Howsam* and *John Wiley* are properly limited to their facts. Pet. 23-27; Pet. App. 17a-19a & n.6. As the petition demonstrated, certiorari is warranted because of the plain conflict between the ruling below and this Court's precedents.

Argentina nonetheless argues that it prevails under this Court's holding in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), "that the question whether a valid and binding agreement to arbitrate exists is generally one for the courts to decide." BIO 1. But that was exactly the Tenth Circuit's reasoning in *Howsam*. *See Howsam*, 537 U.S. at 82. This Court rejected that reasoning, recognizing that it was true only in the overbroad sense that "one might call any potentially dispositive gateway question a 'question of arbitrability,' for its answer will determine whether the underlying controversy will proceed to arbitration on the merits." *Id.* at 83. In fact, under this Court's precedents, "the phrase 'question of arbitrability' has a far more limited scope," *id.*, and specifically is "*not* applicable" to threshold "'procedural' questions" such as whether "a condition precedent to arbitrability has been fulfilled," *id.* at 84-85 (quoting Revised Uniform Arbitration Act of 2000 § 6(c), and citing the staged procedure in *John Wiley*).

Contrary to the D.C. Circuit's simplistic view that parties would expect a court to decide whether an investor must first proceed in court, BIO 14 (citing Pet. App. 15a), the parties here (as in *Howsam*) would naturally expect the arbitrators to decide whether compliance with the litigation precondition may be excused. That question requires construing the Treaty (including its incorporation of international law), *not* domestic Argentine law. The Treaty necessarily contemplates that the arbitrators would be expert in this question: as noted, the Treaty provides an absolute, irrevocable right to arbitrate claims arising from the Treaty's application. "Indeed, these sorts of disputes are resolved almost exclusively by specialist arbitrators, like those here, who are skilled in the interpretation of investment treaties and the matrix of international law in which they are interpreted." USCIB Br. 9.

2. Argentina recognizes that its (erroneous) reading of the ruling below is the only basis on which it can hope to distinguish "cases from the First, Sixth, Seventh, and Eighth Circuits that have all held that compliance with preconditions to arbitration are for arbitrators to decide." BIO 15; *see* Pet. 28-31. For the reasons given in Part I, *supra*, there is no merit to Argentina's argument that the D.C. Circuit did not regard this case as involving a precondition to arbitration.

The conflict will not be repeated again here, other than to reinforce that it is intolerable. This Court has emphasized "the need of the international commercial system for predictability in the resolution of disputes," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 629 (1985),

because parties must know *ex ante* whether an arbitration may commence before undertaking proceedings that regularly last several years and cost millions of dollars. The currently "confused state of United States law," Professors & Practitioners Br. 25, creates an unacceptable level of "uncertainty for parties choosing to arbitrate," USCIB Br. 22. Only this Court can resolve the conflict, which is rooted in the courts of appeals' irreconcilable views over whether this Court's decisions in *Howsam* and *John Wiley* announce a general rule or instead are limited to their particular facts.

C. Even if the D.C. Circuit had held that BG Group and Argentina never reached an agreement to arbitrate, certiorari would be warranted. Argentina admits that the Second Circuit in particular "has held that when the parties' arbitration agreement incorporates rules that empower the arbitrators to consider their own jurisdiction, as the UNCITRAL Rules do, such incorporation provides 'clear and unmistakable' evidence of the parties' intent to delegate questions of arbitrability to the arbitrators." BIO 17; *see* Pet. 31-33; AAA Br. 14-15 & n.14 (collecting additional Second Circuit rulings). The UNCITRAL Rules parallel those of "virtually all major arbitral institutions," USCIB Br. 13, and several circuits have held that such jurisdictional questions are decided by arbitrators under those arbitral systems as well, *see* AAA Br. 17 & n.15; USCIB Br. 16-17.

Argentina repeats the D.C. Circuit's assertion that the UNCITRAL rules are "not triggered until" the litigation condition is satisfied. Pet. App. 14a; BIO 17. But that temporal distinction is

"unprecedented and unsupported," AAA Br. 15: BG Group accepted Argentina's offer by duly submitting a notice of arbitration and claim, and the arbitral proceedings were undertaken pursuant to the UNCITRAL Rules.

Argentina's attempt to convert an ordinary dispute about the meaning of a term in a valid arbitration agreement into an existential dispute over the party's consent to arbitration is a rhetorical trick that could be played with respect to nearly any provision of an arbitration agreement. "*Any* precondition to arbitration, such as an obligation to negotiate for a period of time before commencing arbitration, will by definition refer to an event or events that should have preceded the arbitration." Professors & Practitioners Br. 20.

Argentina could just as well argue that it agreed to arbitrate only timely filed disputes, thereby requiring judicial resolution of untimeliness allegations, despite this Court's clear direction that procedural "prerequisites such as time limits . . . are for the arbitrators to decide." *Howsam*, 537 U.S. at 85 (emphasis omitted). An employer could likewise insist that "the possibility of arbitration does not even arise until" a union exhausts a grievance process, BIO 11, and insist that failure to complete that process before invoking arbitration amounts to a failure to accept the arbitration agreement. *Cf. John Wiley*, 376 U.S. at 556 ("Wiley argues that since Steps 1 and 2 [of the grievance process] have not been followed, and since the duty to arbitrate arises only in Step 3, it has no duty to arbitrate this dispute."); *id.* at 557 (nonetheless holding that question was for the arbitrator).

Not surprisingly, other courts would reject the D.C. Circuit's view that the parties' *prior* agreement to a specified system of arbitral rules is ineffective until *after* preconditions to arbitration are satisfied. As the Second Circuit has reasoned, "[a]ll that is necessary to form an agreement to arbitrate" under an investment treaty is for the investor to "consent to arbitration of an investment dispute in accordance with the Treaty's terms." *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 392 (2d Cir. 2011). And all that is required to effectuate such consent is a notice of arbitration: "a foreign investor's written demand for arbitration completes the 'agreement in writing' to submit the dispute to arbitration." *Id.* at 392-93. Applying those principles in the *Ecuador* case, the Second Circuit found that Chevron had "notif[ied] Ecuador in writing" of its demand for arbitration. *Id.* at 393. And with that, the court concluded that "the existence of a valid arbitration agreement [was] established." *Id.*

III. The Ruling Below Seriously Harms Arbitration.

Certiorari is also warranted because the importance of the question presented is beyond reasonable dispute. Argentina's passing assertion that such preconditions are relatively uncommon, BIO 21 n.9, is mistaken: there are roughly 2700 investment treaties, most of which "contain similar arbitration provisions." Professors & Practitioners Br. 9-10; *see* AWG Br. 12-13. But in any event, analogous preconditions are "prevalent in both commercial contracts and investment treaties." AAA Br. 7-8 & nn.5-6; *see* Pet. 17-18; USCIB Br. 8. In turn, "the question of whether a party has complied

with the procedural preconditions to arbitration is a recurring issue in many international disputes." AWG Br. 14.

Precisely because such provisions are "so common," the ruling below creates "wide-ranging opportunities for delay and dilatory actions," AAA Br. 5, as it "open[s] the flood gates to ancillary litigation," USCIB Br. 7. Because the United States is itself a party to forty-seven similar treaties, Professors & Practitioners Br. 10, the ruling below has "potentially far-reaching consequences for U.S. investors, who invest hundreds of billions of dollars abroad," USCIB Br. 21.

The ruling below specifically throws open the doors to this nation's courts to hear challenges to the results of years-long international arbitrations, especially given the special role of the District of Columbia in international arbitration. Pet. 35-36. The decision provides "an opportunistic pretext to derail already completed arbitration proceedings," AWG Br. 17, with "seriously detrimental consequences for the future of international investment treaty arbitration," USCIB Br. 17. Argentina itself makes a special point of its right to bring such collateral attacks in U.S. courts to completed arbitral awards. BIO 6 n.2.

If the United States is going to depart from the international consensus that these disputes are resolved by arbitrators, adopting a rule "at odds with standards followed by other major international arbitration jurisdictions," AAA Br. 6, that critical judgment should be made by this Court rather than a court of appeals. The ruling below has "set United States courts on a collision course with the

international regime embodied in thousands of [investment treaties]." Professors & Practitioners Br. 15. It substantially upsets the settled expectations of foreign entities, which – because the United States has "the world's largest annual international arbitration caseload," AAA Br. 2 – will now be regularly brought into our courts. For just that reason, the ruling below has generated considerable "scrutiny of and skepticism about how U.S. courts treat international awards rendered in the United States," *id.* 21, and has been recognized as such "a dangerous precedent for both investment and commercial arbitration," Sebastian Perry, *BG Group v Argentina – a Dallah for the US?*, Global Arbitration Review, Jan. 27, 2012, http://www.globalarbitrationreview.com/news/article/30124/bg-group-v-argentina-dallah-...10/12/2012, that it is "a desirable candidate for the granting of a writ of *certiorari* by the US Supreme Court," Goldstein, *US Appellate Review*, *supra*.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition and the *amicus* briefs, certiorari should be granted.

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AMICUS CURIAE BRIEF

No. 12-138

In the Supreme Court of the United States

BG GROUP PLC, PETITIONER

v.

REPUBLIC OF ARGENTINA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

A bilateral investment treaty between the United Kingdom and Argentina provides that before a foreign investor may pursue arbitration of an investment dispute with the host State, the investor must first litigate the dispute for at least 18 months in the host State's courts. The question presented is:

Whether the court of appeals erred in concluding that the parties to the Treaty intended that a court, rather than the arbitral panel, should decide whether petitioner's noncompliance with the litigation requirement deprived the arbitral tribunal of jurisdiction.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Bilateral investment treaties (BITs) are agreements between two sovereign Nations undertaken to promote and protect investment on a reciprocal basis. Nearly 3,000 BITs have been concluded worldwide. See U.N. Conference on Trade and Development, *World Investment Report 2012*, at 84, http://www.unctad-docs.org/UNCTAD-WIR2012-Full-en.pdf. A BIT typically affords various legal protections to covered investors and investments, including basic guarantees of nondiscrimination and prohibitions on expropriation without adequate compensation. See Kenneth Vandevelde, *Bi-*

lateral Investment Treaties: History, Policy, and Interpretation 4-7 (2010) (Vandevelde). A BIT also contains provisions for resolving disputes between the host State and an investor with respect to covered investments, commonly through international arbitration.

BITs often place conditions on an investor's resort to arbitration. For example, the United States' 2012 Model Bilateral Investment Treaty—which the Executive Branch uses as a model in negotiating new BITs—requires that a foreign investor seeking to arbitrate a dispute with the United States provide advance written notice of its intent to pursue arbitration; wait six months after the events giving rise to the claim before initiating arbitration; provide a written waiver of any right to pursue other dispute-settlement procedures with respect to any measure at issue in the arbitration; and initiate arbitration within three years of when the party knew or should have known of the allegedly wrongful acts. See U.S. Dep't of State, *2012 U.S. Model Bilateral Investment Treaty*, arts. 24-26, http://www.state.gov/documents/organization/188371.pdf.

BITs usually specify the fora where investor-state arbitration may proceed, and frequently offer claimants a range of options. BITs commonly provide for arbitration before the International Centre for Settlement of Investment Disputes (ICSID), which administers an international arbitral regime created pursuant to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington Convention), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159. BITs may also contemplate dispute resolution according to the rules of other arbitral institutions and before ad hoc arbitral tribunals convened under the United Nations Commission on International

Trade Law (UNCITRAL) Rules. See Vandevelde 434-435.

An award rendered in an investor-state arbitration may be subject to annulment or set-aside proceedings. For certain investor-state arbitrations, including ad hoc arbitrations conducted using the UNCITRAL Rules, an aggrieved party may seek to set aside an award in a competent court of the jurisdiction in which the arbitration was seated. See, *e.g.*, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) Art. V(1)(e), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (recognizing that an arbitral award may be "set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made"). Investor-state arbitral awards rendered by tribunals seated in the United States may be subject to vacatur proceedings under the Federal Arbitration Act (FAA), 9 U.S.C. 1-16, 201-208.

2. a. In 1990, respondent Republic of Argentina entered into a bilateral investment treaty with the United Kingdom. See Agreement for the Promotion and Protection of Investments (the Treaty), Argentina-United Kingdom, Dec. 11, 1990, 1765 U.N.T.S. 33. The Treaty, which entered into effect in 1993, was designed to "promote a favorable investment environment between the contracting parties." Pet. App. 3a.

The Treaty provides for a "two-tiered system of dispute resolution." Pet. App. 23a-24a. Under Article 8(1) of the Treaty, any dispute between an "investor of one Contracting Party and the other Contracting Party * * * shall be submitted" to a "competent tribunal of the Contracting Party in whose territory the investment was made." Treaty Art. 8(1); Pet. App. 3a. If the court does not issue a final decision within eighteen months,

or if the parties are "still in dispute" after the court's decision, the matter "shall be submitted to international arbitration" upon the request of one of the parties. Treaty Art. 8(2); Pet. App. 24a n.2. The Treaty contemplates arbitration under various arbitral rules, including those established by ICSID, as well as arbitration before an ad hoc tribunal convened under the UNCITRAL Rules. Treaty Art. 8(3). The Treaty further provides that "[t]he arbitral tribunal shall decide the dispute in accordance with the provisions of [the Treaty], the laws of the Contracting Party involved in the dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law." Treaty Art. 8(4).

b. In the early 1990s, Argentina implemented economic and financial reforms intended to restrain inflation, reduce the public deficit, and promote economic growth. Pet. App. 4a, 101a-102a. Argentina established a 1:1 fixed parity between the Argentine peso and the U.S. dollar and privatized various state-owned companies. In particular, Argentina privatized the state-owned gas company, Gas del Estado, by dividing it into smaller companies and tendering controlling interests therein to international investors. *Ibid.*

Petitioner BG Group PLC, a United Kingdom company, invested in one of the newly privatized companies, MetroGAS, through a consortium of investors known as Gas Argentino, S.A. Pet. App. 5a, 104a. MetroGAS had been granted a 35-year exclusive license to distribute gas in the City of Buenos Aires and parts of the surrounding metropolitan area. The license provided that tariffs would be calculated in U.S. dollars and expressed in pesos. *Id.* at 110a-111a, 239a-242a.

c. In 2001, Argentina experienced a severe economic crisis. Pet. App. 5a. In response, the government enacted an emergency law that terminated the currency board that had pegged the Argentine peso to the U.S. dollar, thereby allowing the peso to devalue; converted dollar-based tariffs into peso-based tariffs at a rate of one peso to one dollar; and revised existing contracts for public works and services by converting dollar-based adjustment or indexation clauses into peso-based clauses. *Ibid.* These measures had a substantial impact on petitioner's investment. *Id.* at 62a.

The emergency law also authorized the creation of a "renegotiation" process for public services contracts, which was intended to ameliorate the law's adverse effects on private investors. Pet. App. 5a. The law provided, however, that "any licensee that sought redress in an arbitral or other forum" could not participate in the renegotiation process. *Id.* at 131a. The government also enacted a decree staying for 180 days the country's compliance with any injunctions or final judgments in lawsuits related to the emergency law. *Id.* at 5a.

3. a. In April 2003, petitioner submitted the dispute to international arbitration under Article 8 of the Treaty. Pet. App. 25a. Petitioner argued that Argentina's emergency measures violated the Treaty by, among other things, failing to provide fair and equitable treatment to its investments. *Id.* at 25a-26a.

Although the Treaty requires a claimant to litigate an investment dispute in the host State's courts for at least 18 months before resorting to arbitration, see Pet. App. 23a-24a & n.2, petitioner did not do so. Instead, petitioner initiated arbitration under the UNCITRAL Rules, and an arbitral panel was convened in Washington, D.C. *Id.* at 26a. Argentina challenged the arbitral

tribunal's jurisdiction on the ground that petitioner had failed to comply with the Treaty's litigation requirement.[1] *Id.* at 162a-163a.

b. On December 24, 2007, the arbitral tribunal issued a unanimous decision in petitioner's favor on both jurisdiction and the merits. Pet. App. 92a-306a.

With respect to jurisdiction, the tribunal held that petitioner had properly initiated arbitration. Pet. App. 161a-171a. The tribunal declined to construe the Treaty's litigation requirement "as an absolute impediment to arbitration." *Id.* at 165a. The tribunal explained that Article 32 of the Vienna Convention on the Law of Treaties allows recourse to "supplementary means of interpretation" when interpreting a treaty if application of the ordinary meaning of its terms, understood in context and in light of its object and purpose, would "lead[] to a result which is manifestly absurd or unreasonable." Vienna Convention on the Law of Treaties Art. 32, May 23, 1969, 1155 U.N.T.S. 331; Pet. App. 158a n.128. The tribunal reasoned that it would be "absurd and unreasonable" to mandate compliance with the Treaty's litigation precondition here. *Id.* at 165a-166a. By staying suits related to the emergency law and excluding from the renegotiation process licensees who sought redress in Argentine courts, the tribunal concluded, Argentina had "directly interfer[ed] with the normal operation of

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[1] This case is unlike other cases in which Argentina has refused to comply with final arbitral awards entered against it, for which all applicable review mechanisms have been exhausted, contrary to its international legal obligations. See, *e.g.*, 77 Fed. Reg. 18,899 (2012) (Presidential Proclamation suspending special trade privileges for Argentina based on a finding that it had not acted in good faith in failing to pay arbitral awards owed to U.S. companies).

its courts," *id.* at 170a, and unilaterally hindered "recourse to the domestic judiciary," *id.* at 165a.

On the merits, the tribunal ruled that Argentina had breached the Treaty by "violat[ing] the principles of stability and predictability inherent to the standard of fair and equitable treatment." Pet. App. 241a. The tribunal awarded petitioner approximately $185 million in damages, as well as interest, arbitral costs, and attorneys' fees. *Id.* at 304a-306a.

4. In March 2008, Argentina filed this suit in district court, seeking to vacate the arbitral award under the FAA and the New York Convention. Petitioner BG Group PLC cross-petitioned to confirm the Award. The district court rejected Argentina's challenge to the arbitrators' jurisdiction and confirmed the award on the merits. Pet. App. 21a-57a.

5. The court of appeals reversed the district court's judgment and vacated the award, concluding that the arbitral tribunal had exceeded its powers by allowing arbitration to proceed. Pet. App. 1a-20a.

The court of appeals first considered whether the court itself or the arbitral tribunal should determine the effect of petitioner's failure to commence litigation in an Argentine court on the arbitral tribunal's jurisdiction to entertain the dispute. The court observed that "[t]he Treaty does not directly answer" that question. Pet. App. 14a. The court explained that, under this Court's decisions, when the precondition is of the sort that "the contracting parties would likely have expected a court to decide," *id.* at 11a (quoting *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002)), "'[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so,'" *id.* at 10a (quoting *First*

Options of Chi., Inc. v. *Kaplan*, 514 U.S. 938, 944 (1995)). Concluding that the parties would have expected the effect of noncompliance with the litigation requirement to be determined by a court, the court of appeals held that "the question of arbitrability is an independent question of law for the court to decide." *Id.* at 15a.

Assessing de novo the effect of petitioner's failure to comply with the litigation requirement, the court of appeals held that petitioner "was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration," and that the arbitral tribunal had therefore lacked jurisdiction over the parties' dispute. Pet. App. 19a-20a.

DISCUSSION

The court of appeals examined the text and structure of the Treaty between the United Kingdom and Argentina in order to ascertain the Treaty States' intent concerning who should decide whether the arbitral tribunal had jurisdiction over the underlying dispute in this case. The court's decision thus rested on its construction of the particular provisions of the Treaty, and specifically, the Treaty's requirement that an investor engage in litigation in the host State's courts before initiating arbitration. The court's case-specific conclusions do not conflict with any decision of this Court or another court of appeals. The decision is unlikely to have any significant impact beyond this case because the Treaty's litigation requirement does not have analogues in any modern treaties or other investment agreements to which the United States is a party, and it appears to be uncommon in international treaty practice. For similar reasons, this case would also be an unsuitable vehicle for establishing general principles governing the interpretation

of more typical international or domestic arbitration agreements. Further review is not warranted.

A. The Court Of Appeals Applied Settled Principles In Determining A Question Of Arbitrability By Reference To The Intent Of The Parties

1. Arbitration is fundamentally "a matter of contract between the parties." *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995). Accordingly, a "party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 648 (1986). The jurisdiction of an arbitral tribunal to resolve a dispute thus depends on whether the parties have agreed to arbitrate the matter. See *First Options*, 514 U.S. at 943. In the context of disputes arising under bilateral investment treaties or other investment agreements between States, ascertaining the intent of the contracting States typically also requires application of principles of treaty interpretation. See generally Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

When a court is asked to determine whether an arbitral tribunal exceeded its jurisdiction, it must ascertain whether the parties intended that the particular jurisdictional issue be resolved by the arbitrators or by a court. In *First Options*, this Court, in articulating general principles under United States law governing arbitration, held that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." 514 U.S. at 944. Thus, presumptively, a "gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." *Howsam* v. *Dean Witter Reynolds*,

Inc., 537 U.S. 79, 84 (2002). The Court has also made clear, however, that not every "potentially dispositive gateway question" is a "question of arbitrability" within the meaning of *First Options*. *Id.* at 83. In "circumstance[s] where parties would likely expect that an arbitrator would decide the gateway matter," including "'allegation[s] of waiver, delay, or a like defense to arbitrability,'" the matter is presumptively for the arbitrator to resolve. *Id.* at 84 (quoting *Moses H. Cone Mem. Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

In determining whether the "parties would likely expect that an arbitrator would decide the gateway matter," the Court has examined the nature of the issue and its relationship to the parties' underlying dispute. See *Howsam*, 537 U.S. at 84. In *Howsam*, for example, the Court concluded that a time limit provided by a National Association of Securities Dealers (NASD) rule "falls within the class of gateway procedural disputes" presumptively to be decided by an arbitrator because it "closely resembles" other "gateway questions that this Court has found not to be 'questions of arbitrability'" and because NASD arbitrators would be "comparatively more expert about the meaning of their own rule." *Id.* at 85. Similarly, in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 555-559 (1964), the Court held that whether parties had satisfied a requirement that they exhaust employer-union grievance procedures before proceeding to arbitration was presumptively for the arbitrator to decide because such questions were likely intertwined with the merits of "labor disputes of the kind involved here." *Id.* at 556.

2. In this case, the court of appeals did not purport to articulate any new principles governing whether, under

United States law, courts or arbitrators should bear principal responsibility for reviewing compliance with preconditions to arbitration in dispute resolution clauses. Nor did the court announce any broad rules addressing the full range of such preconditions—such as negotiation or mediation—or addressing preconditions in ordinary private commercial contracts. Instead, the court focused narrowly and specifically on the "'gateway' question" of whether, in entering into the particular Treaty before the court, the sovereign treaty parties, the United Kingdom and Argentina, "intend[ed] that an investor under the Treaty could seek arbitration without first fulfilling Article 8(1)'s requirement that recourse initially be sought in a court" of the host State. Pet. App. 10a. The court then stated that this inquiry raises the "antecedent question of whether the contracting parties intended the answer to be provided by a court or an arbitrator." *Ibid.* Under *First Options*, the court explained, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Ibid.* (quoting *First Options*, 514 U.S. at 944). The court further explained that "[a] court will decide the question" of arbitrability "in the kind of narrow circumstances where the contracting parties would likely have expected a court to have decided the gateway matter." *Id.* at 11a (quoting *Howsam*, 537 U.S. at 83-84).

After examining the text and structure of the Treaty, the court of appeals concluded that "[t]he Treaty provides a prime example of a situation where the 'parties would likely have expected a court' to decide arbitrability," *i.e.*, "whether the gateway provision should be followed." Pet. App. 15a (quoting *Howsam*, 537 U.S. at 83). The court emphasized that, under the Treaty's

multi-stage dispute-resolution framework, the "gateway provision *itself* is resort to a court," which in the court's view indicated that the parties contemplated judicial proceedings prior to arbitration. *Ibid.* The court also relied on the Treaty's express provision that if a dispute arises between the Treaty parties themselves (*i.e.*, between the United Kingdom and Argentina), and they are unable to resolve it through diplomatic channels, the dispute is referred directly to arbitration. Treaty Art. 9(2). In that instance the arbitral tribunal "shall determine its own procedure," Treaty Art. 9(5), which in the court's view indicated "that the contracting parties were aware of how to provide an arbitrator with the authority to determine a question of arbitrability." Pet. App. 14a-15a (internal quotation marks omitted). By contrast, the court held, there "is no clear and unmistakable evidence * * * that the contracting parties intended an arbitrator to decide the gateway question" concerning compliance with the Treaty's distinct requirement for investor-state disputes of litigation in the host State's courts. *Id.* at 15a (citing *First Options*, 514 U.S. at 944).

The court of appeals distinguished *John Wiley* and *Howsam*, which held that certain gateway requirements in private agreements were presumptively for the arbitrator to decide, on the basis of the distinct preconditions at issue in those cases. The court explained that no considerations comparable to the labor policies in *John Wiley* were present in the "entirely different context" here, involving "an international investment treaty between two sovereigns." Pet. App. 16a-17a. The court further explained that in this case, unlike in *John Wiley* and *Howsam*, the facts underlying the question whether the litigation requirement had to be satisfied were not intertwined with the merits of the parties' dispute. *Id.*

at 16a-18a & n.6. The court distinguished *Howsam* on the additional ground that the NASD arbitrators were comparatively more expert than a court would be in construing the rule at issue, whereas in this case there was no reason to think that the arbitral panel would have a comparative advantage in construing the Treaty's litigation requirement. *Id.* at 18a n.6.

3. Petitioner contends (Pet. 21-28) that the court of appeals should have treated the litigation requirement as presumptively for the arbitral panel to adjudicate, like the provisions at issue in *John Wiley* and *Howsam*. Petitioner thus challenges the court of appeals' application of settled principles to the particular treaty provision at issue in this case and the court's case-specific conclusion that the parties to the Treaty would have expected a court to decide whether the litigation precondition had to be satisfied. That narrow issue does not warrant this Court's review.

To be sure, the court of appeals' interpretation of the Treaty is not free of doubt. The Treaty's choice-of-law provision, for example, states that disputes shall be decided "in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in the dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law." Treaty Art. 8(4). While the court of appeals applied principles articulated by this Court in cases involving arbitrability under private (and mostly domestic) agreements, it did not consider the role that international law might play in ascertaining the intent of the Treaty parties concerning the application of the threshold litigation requirement. The court did not, for example, address petitioner's argument that interpret-

ing the Treaty to mandate compliance with the litigation requirement under these circumstances would be "absurd and unreasonable" and therefore contrary to international-law principles of treaty interpretation. Cf. Christopher F. Dugan et al., *Investor-State Arbitration* 208 (2008) ("[Q]uestions concerning the consent of the parties to jurisdiction, in the context of a BIT arbitration, are generally governed by international law.") (footnote omitted).[2]

These questions, however, concern the court of appeals' case-specific construction of the Treaty and its conclusions about the intent of the United Kingdom and Argentina in entering into the Treaty. For the reasons discussed below, any errors in the court's construction of the Treaty are unlikely to have implications beyond this case.

B. The Court Of Appeals' Decision Does Not Conflict With Decisions Of Other Courts Of Appeals

1. Petitioner asserts (Pet. 28-34) that the court of appeals' decision deepens an existing conflict among the circuits regarding "the division of competence over preconditions to arbitration." Pet. 28. But the decisions

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[2] Petitioner did not argue before the court of appeals that it was entitled, through the Treaty's "most favored nation" clause, to borrow the more favorable investor-state dispute resolution provisions contained in the Argentina-United States BIT, which does not contain a litigation requirement. The court of appeals therefore did not consider that issue. Some arbitral tribunals interpreting Argentine BITs containing such a litigation requirement have applied the most favored nation clause in ruling that investors need not exhaust the litigation requirement prior to commencing arbitration. See, *e.g.*, *Hochtief AG* v. *Argentina*, Case No. ARB/07/31, Decision on Jurisdiction, ¶¶ 56-111, ICSID (Oct. 24, 2011); *Impregilo S.p.A.* v. *Argentina*, Case No. ARB/07/17, Award, ¶¶ 95-109, ICSID (June 21, 2011).

on which petitioner relies applied *Howsam* and *First Options* to the specific preconditions at issue in each case, which were quite different from the requirement at issue here. See *Dialysis Access Ctr., LLC* v. *RMS Lifeline, Inc.*, 638 F.3d 367, 383 (1st Cir. 2011) (arbitrator should review compliance with good-faith negotiation precondition that was a procedural prerequisite analogous to the grievance procedure in *John Wiley*); *JPD, Inc.* v. *Chronimed Holdings, Inc.*, 539 F.3d 388, 391-393 (6th Cir. 2008) (effect of noncompliance with alleged conditions precedent to arbitration concerning contractual obligations for documenting finances was for arbitrator to resolve because, as in *Howsam*, the issue was intertwined with the merits); *Lumbermens Mut. Cas. Co.* v. *Broadspire Mgmt. Servs., Inc.*, 623 F.3d 476, 481 (7th Cir. 2010) (notice-of-claim requirement was, as in *Howsam*, a procedural issue within arbitrators' expertise and intertwined with the merits because it involved "the same documents and * * * the same issues"); *International Bhd. of Elec. Workers* v. *Hope Elec. Corp.*, 380 F.3d 1084, 1099 (8th Cir. 2004) (whether grievance preconditions under labor agreement had been satisfied was, as in *John Wiley*, presumptively for the arbitrator to decide); cf. *Kemiron Atl., Inc.* v. *Aguakem Int'l, Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002) (duty to arbitrate was never triggered because it was undisputed that neither party requested mediation as required by the agreement).

Those decisions' application of settled standards to the particular agreement in each case, and their conclusions about the parties' intent, do not create a conflict warranting this Court's review. More basically, none of those decisions concerned a litigation requirement,

much less such a requirement in a treaty between sovereign States.

2. Petitioner also contends (Pet. 31-34) that the decision below conflicts with *Republic of Ecuador* v. *Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011) (*Ecuador*), which held that the incorporation of the UNCITRAL Rules into the arbitration clause of the United States-Ecuador BIT, see Bilateral Investment Treaty, United States-Ecuador, Art. VI, Aug. 27, 1993, S. Treaty Doc. 103-15, constituted "'clear and unmistakable evidence' that the parties intended" that waiver and estoppel defenses should "be decided by the arbitral panel in the first instance." 638 F.3d at 394. Petitioner is incorrect.

The court of appeals in this case agreed with the *Ecuador* court that the incorporation of the UNCITRAL Rules into an investment treaty could constitute "'clear[] and unmistakabl[e] evidence' that the parties intended for the arbitrator to decide questions of arbitrability." Pet. App. 14a (internal citations omitted). But the court concluded, based on its analysis of the text and structure of the particular Treaty here, that the Treaty's incorporation of the UNCITRAL Rules was subject to a "temporal limitation," in that the Rules were not "triggered" until "after an investor has first * * * sought recourse, for eighteen months, in a court of the contracting party where the investment was made." *Ibid.* By contrast, no similar pre-arbitration litigation requirement was at issue in *Ecuador*. The *Ecuador* court thus had no occasion to consider whether the United States-Ecuador BIT's incorporation of the UNCITRAL Rules was subject to a similar "temporal limitation," or whether, even if so limited, the incorporation of the Rules nonetheless would constitute clear and unmistakable evidence that the arbitral panel should

determine compliance with that requirement. See *Ecuador*, 638 F.3d at 393-395 (considering Ecuador's argument that party waived or was estopped from arbitration because it had agreed to resolve dispute in another manner); cf. United States-Ecuador BIT Art. VI (containing no litigation requirement).

C. The Court Of Appeals' Decision Is Unlikely To Have Implications Beyond The Unusual Circumstances Of This Case And Does Not Warrant This Court's Review

In light of its case-specific nature, the decision below will likely have few implications for the construction of international investment treaties. Nor would this case be an appropriate vehicle by which to provide general guidance on the interpretation of international or domestic commercial agreements.

1. a. The decision below is unlikely to have any significant impact on the interpretation of international investment treaties generally, and United States treaty practice in particular.

In concluding that a court should decide whether petitioner was required to comply with the Treaty's litigation requirement, the court of appeals relied heavily on the fact that the Treaty itself provided that the dispute be submitted for *judicial* determination, rather than some other form of dispute resolution. See Pet. App. 15a. That aspect of the Treaty is unusual. No modern United States investment treaty contains a similar litigation requirement.[3] And such a requirement also ap-

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[3] We are aware of one similar (but not identical) litigation requirement in a United States investment treaty, namely, the now-superseded BIT between the United States and Morocco. See Treaty Concerning the Reciprocal Protection of Investments, United States-Kingdom of Morocco, Art. VI, July 22, 1985, IC-BT 624. That treaty was superseded in the United States-Morocco Free Trade Agree-

pears to be uncommon in international treaty practice more generally, as arbitration treaties and other international investment agreements between States do not often require resort to local courts as a precondition to arbitration. See Vandevelde 439-442 (stating that while negotiation and mediation are common preconditions, only a "few BITs * * * require exhaustion of, or at least some recourse to, local remedies" in court). The relatively infrequent incidence of such provisions is unsurprising, as "one of the principal reasons for creating treaty-based, investor-state arbitration [is] to enable investors to avoid the courts of the countries in which they invest." Jeswald W. Salacuse, *The Law of Investment Treaties* 358 (2010).

The court of appeals' decision is therefore unlikely to have broad implications for the interpretation of international investment treaties generally. Although petitioner observes (Pet. 18) that dispute-resolution preconditions are common in international treaties to which the United States is a party, the preconditions employed in those agreements typically involve cooling-off periods, mediation, or negotiation. See Vandevelde 439-442; cf. Pet. 18 (citing Int'l Bar Ass'n, *IBA Guidelines for Drafting International Arbitration Clauses* 30 (2010), which states that negotiation and mediation preconditions are "common," without mentioning litigation preconditions). The court of appeals did not purport to announce principles that would apply when the States entering into a

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ment, although certain grandfathered investment claims under the BIT may be brought until 2016. United States-Morocco Free Trade Agreement Art. 1.2(3) & (4), June 15, 2004, 44 I.L.M. 544, http://www.ustr.gov/free-trade-agreements/morocco-fta/final-text. To our knowledge, the litigation provision in the BIT has not been the subject of litigation.

treaty have agreed to a precondition that does not expressly require resort to a court in the host State, see Pet. App. 15a, and thus its decision likely will not have implications for the more common types of preconditions to arbitration used in typical investment treaties.[4]

b. The court's decision also has limited implications for the interpretation of modern United States investment agreements. The United States is not a party to the Treaty at issue here, which does not extend to United States investors or address their rights in disputes arising out of their investments in Argentina. And because modern United States investment treaties do not contain comparable litigation requirements, this case offers no occasion to provide guidance on jurisdiction over arbitrability questions that arise in connection with treaties to which the United States is a party.

---

[4] Because the decision below rests on a case-specific construction of an unusual provision in a treaty between two other nations, it is unlikely to discourage disputing parties from locating future arbitrations within the United States. But see Pet. 35-36; Pet. Reply Br. 11-12. And in any event, de novo judicial review of certain questions of arbitral jurisdiction is not unprecedented, as many arbitration regimes provide for such review when the resisting party challenges the existence or validity of an agreement to arbitrate. See *Dallah Real Estate & Tourism Holding Co.* v. *Ministry of Religious Affairs, Gov't of Pakistan*, [2010] UKSC 46 ¶ 104 (holding that English courts are "entitled (and indeed bound) to revisit the question of the [arbitral] tribunal's decision on jurisdiction" in post-arbitral proceedings); Gary B. Born, *International Commercial Arbitration* 1139-1140 (2009); George A. Bermann, *The 'Gateway' Problem in International Commercial Arbitration*, 37 Yale J. Int'l L. 1, 18-19 (2012) (explaining that French courts engage in de novo review of an arbitral tribunal's jurisdictional findings); William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 Am. Rev. Int'l Arb. 133, 134-136 (1997) (describing decision of Swiss high court applying de novo review under similar circumstances).

c. Nor does the decision below warrant review by this Court as a vehicle to articulate principles concerning the interpretation of international investment treaties more generally. Only one of the parties to the particular treaty at issue (Argentina) is a party to this litigation, and Argentina of course agrees with the court of appeals' interpretation of the Treaty. Nor is it clear from the submissions in the lower courts whether Argentina's interpretation of the Treaty reflects the shared intent of both treaty parties. And because the litigation requirement in this Treaty is relatively unusual, review by this Court would not necessarily shed light on the arbitrability of disputes concerning other, more common prerequisites to arbitration.

2. a. Similarly, the decision below will likely not affect the construction of domestic commercial arbitration agreements. The Treaty's litigation provision requires resort to a formal legal process in the courts of one of the Treaty States, thereby permitting that State to provide an avenue for redress within its own sovereign legal structure. Such a provision is unlikely to appear in a domestic commercial arbitration agreement, as neither party to such an agreement has comparable sovereign status or its own court system, and the purpose of a commercial agreement is to resolve disputes without the expense and delay typically associated with litigation in court. See *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010). As discussed above, courts construing domestic commercial arbitration agreements have looked to the nature of the precondition at issue and its relationship to the merits of the dispute between the parties in deciding whether arbitral jurisdiction is presumptively for the arbitrators to decide. See pp. 10, 15, *supra*. The court of appeals' inter-

pretation of the Treaty is therefore unlikely to affect the construction of domestic commercial agreements.

b. Petitioner urges (Pet. 16) this Court to grant review in order to hold that "it is for arbitrators, not courts, to decide whether preconditions to arbitration have been fulfilled or excused," without distinguishing between domestic commercial arbitration agreements and arbitration provisions found in international treaties. But international investment treaties like the Treaty here are distinct from domestic arbitration agreements in several respects. Such a treaty is an agreement between two sovereigns that establishes a legal regime setting forth the protections that each will accord to the other's investors and investments, as well as the terms under which each sovereign Contracting State agrees to submit to an adjudication of disputes with private parties. It is thus structurally different from typical domestic commercial arbitration agreements that govern the circumstances under which the two private parties will arbitrate their disputes with each other. That structure, as well as the sovereign status of the parties and the background of international law and state practice, may influence the nature of conditions precedent to arbitration in individual international investment treaties and the parties' underlying intent in including them.

For example, the United States has taken the position under the North American Free Trade Agreement (NAFTA) that unless a claimant investor complies with the requirements enumerated in Article 1121 ("Conditions Precedent to Submission of a Claim to Arbitration"), no binding agreement to arbitrate arises with the respondent State. See, *e.g.*, *Tembec Inc.* v. *United States*, Objection to Jurisdiction of Respondent United

States of America, at 35-38, UNCITRAL (Feb. 4, 2005); *Methanex Corp.* v. *United States*, Memorial on Jurisdiction and Admissibility of Respondent United States of America, at 70-78, UNCITRAL (Nov. 13, 2000); NAFTA Art. 1121, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993). The other two State parties to NAFTA, Canada and Mexico, have similarly stated that Article 1121 imposes mandatory prerequisites. See *Mondev Int'l Ltd.* v. *United States*, Case No. ARB(AF)/99/2, Rejoinder on Competence and Liability of Respondent United States of America, at 61-62, ICSID (Oct. 1, 2001) (citing Canada's and Mexico's position).

In addition, international agreements involving sovereign parties implicate "concerns of international comity" that domestic agreements do not. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985); cf., *e.g.*, George A. Bermann et al., *Restating the U.S. Law of International Commercial Arbitration*, 113 Penn State L. Rev. 1333, 1337 (2009) (stating that investment treaty arbitrations involve issues that "are distinct from their conventional international commercial arbitration counterparts"); Campbell McLachlan et al., *International Investment Arbitration: Substantive Principles* 65 (2007) (identifying "debate about the extent to which an analogy can be maintained between BIT arbitrations and commercial arbitrations"). Consequently, this case would not be a suitable vehicle in which to establish general rules concerning arbitrability questions that would apply to domestic agreements, as distinct from international investment treaties and the particular Treaty here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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PETITIONER'S BRIEF

RECORD AND BRIEFS

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No. 12-138

IN THE

Supreme Court of the United States

BG GROUP PLC,

Petitioner,

v.

REPUBLIC OF ARGENTINA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

In disputes involving a multi-staged dispute resolution process, does a court or instead the arbitrator determine whether a precondition to arbitration has been satisfied?

PARTIES TO THE PROCEEDING BELOW

The case caption contains the names of all parties who were parties in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioner states that it has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

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BRIEF FOR PETITIONER

Petitioner BG Group Plc (BG) respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals vacating the final arbitral award in petitioner's favor (Pet. App. 1a) is reported at 665 F.3d 1363. The opinions of the district court denying respondent's petition to vacate or modify the award (Pet. App. 58a) and granting petitioner's motion to confirm the award (Pet. App. 21a) are reported at 715 F. Supp. 2d 108 and 764 F. Supp. 2d 21, respectively. The award (Pet. App. 92a) is not published.

JURISDICTION

The court of appeals issued its opinion on January 17, 2012. A timely petition for rehearing or rehearing en banc was denied on March 15, 2012. Pet. App. 307a. The Chief Justice extended the time to file a petition for certiorari to and including July 27, 2012. App. No. 11A1134. Petitioner timely filed the petition, which this Court granted on June 10, 2013. 133 S. Ct. 2795 (2013). This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND TREATY PROVISIONS

Section 10(a) of the Federal Arbitration Act, 9 U.S.C. § 10(a), provides:

> In any of the following cases the United States court in and for the district wherein the award

> was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Article 8 of the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, Arg.-U.K., Dec. 11, 1990, 1765 U.N.T.S. 33, provides:

> **Settlement of Disputes**
> **Between an Investor and the Host State**
>
> (1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled

shall be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.

(2) The aforementioned disputes shall be submitted to international arbitration in the following cases:

(a) if one of the Parties so requests, in any of the following circumstances:

(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;

(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;

(b) where the Contracting Party and the investor of the other Contracting Party have so agreed.

(3) Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and

Nationals of other States, opened for signature at Washington DC on 18 March 1965[1] (provided that both Contracting Parties are Parties to the said Convention) and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

(b) an international arbitrator or *ad hoc* arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If after a period of three months from written notification of the claim there is no agreement to one of the above alternative procedures, the Parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The Parties to the dispute may agree in writing to modify these Rules.

(4) The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in the dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law. The arbitration decision shall be final and binding on both Parties.

[1] Treaty Series No. 25 (1967), Cmnd. 3255.

(5) The provisions of this Article shall not apply where an investor of one Contracting Party is a natural person who has been ordinarily resident in the territory of the other Contracting Party for a period of more than two years before the original investment was made and the original investment was not admitted into that territory from abroad. But, if a dispute should arise between such an investor and the other Contracting Party, the Contracting Parties agree to consult together as soon as possible so that they can reach a mutually acceptable solution.

STATEMENT

I. Factual Background

A. The U.K.–Argentina Bilateral Investment Treaty

This case arises from cross-motions to vacate (by respondent Republic of Argentina) and enforce (by petitioner BG Group Plc) an arbitral award rendered in the United States. The award resolved a dispute under the bilateral investment treaty (referred to as a "BIT") between Argentina and the United Kingdom. *See* Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, Arg.-U.K., Dec. 11, 1990, 1765 U.N.T.S.

33 (the Treaty), *reproduced infra* App. 1a-15a.[1]

The purpose of the Treaty is to encourage cross-border investment by protecting the investments of U.K. nationals in Argentina and vice-versa. To this end, the Treaty provides that "[i]nvestments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment" and that "[n]either Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party." Treaty art. 2(2), App. 4a. The Treaty also provides for National Treatment and Most-Favored-Nation Treatment, *i.e.*, Argentina may not subject U.K. investments to treatment less favorable than domestic or other foreign investments, and the United Kingdom must treat Argentine investments the same way. *Id.* art. 3, App. 4a-5a. Other clauses provide investors with a guarantee of prompt and adequate compensation in the event of expropriation, and the ability to repatriate investments and returns. *Id.* arts. 5-6, App. 5a-7a.

Investors are less likely to invest under the Treaty without a reliable and neutral means of enforcing

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[1] Argentina has entered into 58 BITs, while the United Kingdom has entered into 105. *See* BITs Concluded by Argentina, U.N. Conf. on Trade & Dev. (June 1, 2013), http://unctad.org/Sections/dite_pcbb/docs/bits_argentina.pdf; BITs Concluded by the United Kingdom, U.N. Conf. on Trade & Dev. (June 1, 2013), http://unctad.org/Sections/dite_pcbb/docs/bits_uk.pdf. Around the globe, there are presently 2857 BITs in force. *See* U.N. Conference on Trade and Dev., *World Investment Report*, at xix (2013).

their rights. Arbitration is therefore a critical feature of international commerce because it provides foreign parties with an impartial forum in which to resolve their disputes. Arbitration constitutes "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974).

In order to encourage fulfillment of its objective "to create favourable conditions for greater investment by investors of one State in the territory of the other State," Treaty recitals, App. 1a, the Treaty permits investors to submit disputes with contracting states to arbitration, avoiding the potential bias of local courts. Under Article 8, if a dispute regarding an investment arises between an investor and a contracting state, either party may submit it to "the competent tribunal" (*i.e.*, the courts) of the contracting state. *Id.* art. 8(1), App. 8a-9a. But the judiciary has no power to render a final decision on the dispute. Instead, if either party remains dissatisfied after eighteen months in litigation – whether or not the local court has rendered a decision – the dispute "shall be submitted to international arbitration . . . ." *Id.* art. 8(2), App. 9a.

The Treaty provides that the arbitration presumptively will be conducted under the rules of the United Nations Commission on International Trade Law (UNCITRAL). *Id.* art. 8(3), App. 9a-10a. Article 21 of the UNCITRAL Rules grants the arbitral tribunal the power to "rule on objections that it has no jurisdiction." Rep. of the U.N. Comm. on Int'l Trade Law, 9th Sess., Apr. 12-May 7, 1976, U.N. Doc. A/31/17, at 24, art. 21(1); GAOR, 31st Sess., Supp. No. 17 (1976).

The Treaty provides that it shall be interpreted in accordance with its terms, any relevant domestic law of the contracting state, and "the applicable principles of international law." Treaty art. 8(4), App. 10a. The primary international law principles governing treaty interpretation are codified in the Vienna Convention on the Law of Treaties, *concluded on* May 23, 1969, 1155 U.N.T.S. 331 (Vienna Convention), which both the United Kingdom and Argentina have ratified.[2]

In resolving the dispute, the arbitral tribunal is not directed to defer to, let alone give effect to, any judgment of the local court. Nor may the local court review the arbitrators' decision. Instead, the "arbitration decision shall be final and binding on both Parties." Treaty art. 8(4), App. 10a.

B. BG's Investment In Argentina

Petitioner BG is a U.K. company that made a major investment in Argentina's natural gas sector.[3] In the early 1990s, Argentina privatized its state gas monopoly, Gas del Estado. Pet. App. 101a-02a. The company's assets were distributed among multiple new private entities. These included MetroGAS, which received an exclusive, thirty-five-year license to distribute natural gas in Buenos Aires and certain adjoining areas. *Id.* 103a.

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[2] *See* Status of the Vienna Convention on the Law of Treaties, U.N. Treaty Collection, http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en (last visited Aug. 23, 2013).

[3] The factual recitation is drawn from the arbitral tribunal's findings of fact. *See generally* Pet. App. 101a-31a.

Argentina then sought to sell to foreign investors a controlling interest in MetroGAS and in the other private sector successors to Gas del Estado. *Id.* 102a-03a. To encourage that investment, as well as the investment needed to update the country's aging infrastructure, Argentina pegged its currency to the U.S. dollar at a one-to-one exchange rate and established a regulatory framework to convince foreign investors that the gas sector was stable. The framework included: a law requiring gas tariffs (*i.e.*, revenues for gas distribution companies) to be calculated so as to provide a reasonable rate of return commensurate with investments of similar risk, and in line with international market indicators; a decree stating that gas tariffs would be calculated in U.S. dollars, thereby protecting tariffs against a devaluation of the local currency; guarantees against arbitrary modification of tariffs or license terms; and a stabilization mechanism permitting gas providers to obtain increased tariffs if economic conditions changed. *Id.* 105a-10a. These protections were incorporated into MetroGAS's license. *Id.* 110a-17a.

Relying on this regulatory framework, BG participated in a consortium that purchased a majority interest in MetroGAS. *Id.* 104a. BG owned 45.11% of the Argentine company when it commenced the arbitration. *Id.* 105a.

C. The Argentine Crisis

Starting in 1998, and culminating in 2001, Argentina suffered an economic crisis. It responded by enacting a series of measures that eviscerated the regulatory framework on which the investments of BG (and others) rested. *Id.* 126a-29a. Among other things, Argentina converted petitioner's U.S. dollar-

based gas tariffs into Argentine peso-based tariffs at a rate of one peso per dollar. At the time, the market exchange rate ranged between three and four pesos to the dollar. *Id.* 127a.

These changes were devastating to BG's investment in MetroGAS. First, the value of MetroGAS's revenues plummeted because the tariffs it was earning for distributing gas became worth only a fraction of their former value. Meanwhile, MetroGAS had borrowed money on international capital markets to finance its investments and operations in Argentina, and those debts (denominated in currencies more stable than the Argentine peso) retained their full value. Thus, almost overnight, MetroGAS's debts swamped its corresponding income, effectively destroying BG's investment. In one year, the rate of return on MetroGAS's operations fell from eight percent to negative one hundred and forty-two percent. *Id.* 129a-30a.

As discussed, Argentina had entered into the Treaty and other BITs – all of which guaranteed investors protection from unfair and inequitable measures. But to prevent aggrieved parties from securing relief under those BITs, Argentina adopted decrees sharply curtailing investors' ability to vindicate their rights in local courts (which in turn is a precondition to arbitration under the Treaty and many other Argentine BITs). *Id.* 242a. First, the President issued a decree staying all suits and injunctions alleging harm as a result of the measures described above. *Id.* 166a-67a. Second, Argentina established a renegotiation process designed to alleviate the economic effects of the measures, but barred any

licensee who litigated against Argentina from participating. *Id.* 169a-70a.

D. BG's Dispute Under The Treaty

Numerous investors brought arbitration claims against Argentina under the various Argentine BITs. Facing severe penalties if it resorted to the Argentine courts, BG filed its notice of arbitration under the Treaty on April 25, 2003. *Id.* 94a.

BG sought compensation for the effects of the Argentine measures that destroyed its investment and restricted it from both pursuing judicial relief and benefiting from the renegotiation process. BG alleged that by dismantling the regulatory framework that induced its investment – including by curtailing access to judicial redress – Argentina: (1) breached Article 5 of the Treaty by expropriating the value of BG's shareholding in its consortium and in MetroGAS, and by impairing BG's rights under the MetroGAS license; and (2) breached Article 2(2) of the Treaty by failing to provide BG with fair and equitable treatment, protection, and security, by taking unreasonable and discriminatory measures, by failing to observe obligations entered into with regard to BG's investments, and for the acts of its judiciary. *Id.* 132a.

Argentina was entitled to respond by submitting the dispute to its own courts, *see* Treaty art. 8(1), App. 8a-9a, but it chose not to do so. Pet. App. 163a. Because the parties did not agree on a different arbitral system, the dispute was submitted to UNCITRAL arbitration. Treaty art. 8(3), App. 9a-10a; *see also* Pet. App. 97a.

The arbitration proceeded under the UNCITRAL Rules. Under Article 16(1), which allows the parties to

set the place of arbitration, the parties agreed to site the arbitration in Washington, DC. Under Article 7(1), which provides that each party shall select one member of a three-member panel, who will in turn appoint the third, the parties appointed arbitrators. Pet. App. 97a.

The arbitrators were eminent in the fields of public international law and international arbitral procedure and jurisdiction. They were: Professor Albert Jan van den Berg, Professor of Law (Arbitration Chair) at Erasmus University, Rotterdam (appointed by petitioner); Professor Alejandro M. Garro, an Argentine national and Senior Research Scholar, Parker School of Foreign and Comparative Law, Columbia University (appointed by respondent); and, as the jointly selected presiding arbitrator, Mr. Guillermo Aguilar Alvarez, former Principal Legal Counsel for Mexico in the negotiation of the North American Free Trade Agreement (NAFTA) and current lecturer in international investment law at Yale Law School.

Argentina participated actively in the arbitration. Particularly relevant here, Argentina expressly invoked and relied upon Article 21 of the UNCITRAL Rules – which gives the tribunal the power to determine its own jurisdiction – in requesting that the arbitrators enter an order dismissing BG's claim for lack of jurisdiction. Argentina argued, *inter alia*, that under the terms of the Treaty, BG could initiate arbitration only after eighteen months of litigation in an Argentine court. *Id.* 162a-63a.

After more than four years of proceedings, multiple written submissions from each side, and an eight-day hearing involving fourteen witnesses, *id.*

99a-101a, the panel issued a 139-page award finding for BG on both jurisdiction and the merits, *id.* 304a-06a. The award was unanimous.

The tribunal analyzed Argentina's jurisdictional objection at length, considering in detail the applicable Treaty language, the controlling principles of international law, and the measures Argentina had taken to impair access to judicial redress. *Id.* 161a-71a. The tribunal acknowledged that parties ordinarily would be required to litigate for eighteen months before resorting to arbitration, but determined:

> As a matter of treaty interpretation, however, Article 8(2)(a)(i) cannot be construed as an absolute impediment to arbitration. Where recourse to the domestic judiciary is unilaterally prevented or hindered by the host State, any such interpretation would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention, allowing the state to unilaterally elude arbitration, which has been the engine of the transition from a politicized system of diplomatic protection to one of direct investor-State adjudication.

Id. 165a-66a.

The tribunal then considered the measures that Argentina had taken to impede investors such as BG from obtaining redress, and concluded that the Executive Branch of the Argentine government had "directly interfer[ed] with the normal operation of its courts," including by "excluding litigious licensees from the renegotiation process." *Id.* 170a. The tribunal concluded that:

> a serious problem would loom if admissibility of Claimant's claims were denied thus allowing Respondent at the same time to:
>
> a) restrict the effectiveness of domestic judicial remedies as a means to achieve the full implementation of the Emergency Law and its regulations;
>
> b) insist that the Claimant go to domestic courts to challenge the very same measures; and
>
> c) exclude from the renegotiation process any licensee that does bring its grievance to local courts.

Id. 171a. The tribunal thus found BG's claims to be "admissible" under the Treaty. *Id.*[4]

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[4] Having determined that Article 8 did not require BG to comply with the litigation precondition under these extreme circumstances, the tribunal found it unnecessary to address BG's alternative arguments in favor of the tribunal's jurisdiction. For example, it did not decide whether, under the Treaty's most-favored-nation provision, BG was exempt from pursuing litigation. Pet. App. 171a. BG had argued that the most-favored-nation clause required Argentina to afford BG the same treatment as Argentina granted U.S. investors under the U.S.-Argentina BIT. *Id.* 163a; *see* Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. VII(3), Nov. 14, 1991, S. Treaty Doc. No. 103-2 (1993) (authorizing an investor to "consent in writing to the submission of the dispute for binding arbitration" after attempted consultation and negotiation, without litigation). The majority of tribunals deciding the issue have held that the most-favored-nation clause in the Treaty (and other Argentine BITs) renders the litigation precondition inoperative. *See, e.g.*, Nat'l Grid Plc v.

On the merits, the tribunal found for BG on its fair and equitable treatment and certain other claims, but rejected the expropriation claim. It held that Argentina's measures "entirely altered the legal and business environment" and had "reversed commitments towards BG," violating Article 2(2) of the Treaty, which guarantees fair and equitable treatment and non-discrimination against foreign investors. *Id.* 241a-42a, 305a. The tribunal awarded BG $185,285,485.85 – the difference between the fair value of its investment in MetroGAS before and after the measures – plus interest, costs, and fees. *Id.* 305a-06a.

II. Principles Governing The Confirmation And Vacatur Of International Arbitration Awards Rendered In The United States

There are two major components to the international legal regime governing arbitration. The primary treaty governing the recognition and enforcement of international arbitral awards is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention or Convention), June 10, 1958, 21 U.S.T. 2517.[5] By

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Argentine Republic, UNCITRAL, Decision on Jurisdiction, ¶¶ 53-94 (June 20, 2006), *available at* http://italaw.com/links.htm.

[5] The Convention presently has over one hundred and forty member states and became effective in the United States on December 29, 1970. *See Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Aug. 21, 2013).

contrast, efforts to vacate arbitral awards are governed by the domestic law of the nation in which the award was entered. *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287 (5th Cir. 2004). That is, by agreeing on an arbitral seat, the parties agree that any judicial challenge to the validity of the award will be governed by the law of that jurisdiction.

Congress implemented the New York Convention in Chapter 2 of the Federal Arbitration Act (FAA). 9 U.S.C. §§ 201-08. The statute provides for the confirmation of arbitral awards governed by the Convention. *See id.* § 202.[6]

"The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk*, 417 U.S. at 520 n.15. The Convention thus embodies the international community's commitment to arbitration, and it calls on "national courts to subordinate domestic notions of

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[6] In an action to enforce an award under the Convention in the United States, "[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207. These defenses, enumerated in Article V of the Convention, are narrow and include that the arbitrators decided an issue not submitted to them, New York Convention art. V(1)(c), and that confirmation of the award would be contrary to the public policy of the confirming state, *id.* art. V(2)(b).

arbitrability to the international policy favoring commercial arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 (1985). "A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate" efforts to facilitate international commerce, "but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantage." *Scherk*, 417 U.S. at 516-17.

As discussed, the New York Convention addresses only the enforcement of awards; it does not provide any basis for vacating an award. An unsuccessful party to an arbitration that was conducted in the United States and is subject to the Convention may petition a U.S. court to vacate the award on one of the grounds specified in Chapter 1 of the FAA. *See Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 22-23 (2d Cir. 1997).

The FAA establishes an "emphatic federal policy in favor of arbitral dispute resolution," which "applies with special force in the field of international commerce." *Mitsubishi Motors*, 473 U.S. at 631. Congress permitted courts to overturn arbitral awards only in the limited circumstances specified in Section 10 of the FAA. As relevant here, a district court may vacate an award "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4).

Under Section 10, judicial review of any decision within the arbitrators' competence is highly deferential and weighted in favor of the enforcement of arbitral awards. Courts must resolve "any doubts

concerning the scope of arbitral issues . . . in favor of arbitration," *Mitsubishi Motors*, 473 U.S. at 626 (citation omitted), and vacate awards only in cases of "egregious departures from the parties' agreed-upon arbitration" or "extreme arbitral conduct," *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008); *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("[R]eview under § 10 [of the FAA] focuses on misconduct rather than mistake.").

This Court has recognized a narrow exception to that general rule: deference to the arbitrators is not necessarily warranted when a challenge to the arbitrators' jurisdiction poses a substantive "question of arbitrability" concerning "the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter . . . ." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). The gateway matters in this category include: (1) whether an arbitration agreement exists at all; and (2) whether an arbitration clause applies to a particular subject matter. *See id.* at 84; *see also Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2856-57 (2010). If the challenge raises such questions of substantive arbitrability, courts are directed to resolve the question "independently" unless they find clear and unmistakable evidence of the parties' intent to assign the issue to the arbitrators. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). In every other circumstance – including when the challenge concerns "procedural arbitrability, *i.e.*, whether . . . conditions precedent to an obligation to arbitrate have been met" – the matter is presumptively "for the arbitrators to decide," and subject to the ordinary

deferential standard of review under Section 10 of the FAA. *Howsam*, 537 U.S. at 85 (citation omitted).

III. Proceedings Below

A. Proceedings In The District Court

Respondent filed a petition in the U.S. District Court for the District of Columbia seeking to vacate the award (the Vacatur Petition). BG cross-moved to confirm the award under the FAA and the New York Convention.[7]

Argentina set forth five challenges to the award under the FAA, only one of which is relevant here: that by allowing the case to proceed to arbitration without first requiring eighteen months of litigation, "[t]he Arbitrators exceeded their authority by disregarding terms of [sic] parties' [arbitration] agreement." Vacatur Petition at 9 ¶ 41, No. 08-cv-485-RBW (D.D.C. Mar. 21, 2008), ECF No. 1. Argentina argued that by not requiring compliance with the litigation precondition, "the Tribunal has construed the disputed agreement in a completely irrational way." *Id.* at 11 ¶ 49. Argentina therefore requested

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[7] Argentina's Vacatur Petition identified the basis of the district court's subject matter jurisdiction as Sections 10(a) and 11 of the FAA. *See* Vacatur Petition at 2 ¶ 5, No. 08-cv-485-RBW (D.D.C. Mar. 21, 2008), ECF No. 1. However, the FAA does not confer subject matter jurisdiction over controversies touching arbitration. *Hall Street Assocs.*, 552 U.S. at 581-82. The district court correctly concluded that it instead had jurisdiction under 9 U.S.C. § 203, which confers jurisdiction over proceedings involving awards falling under the New York Convention. Pet. App. 68a-76a.

that the award be vacated under Section 10(a)(4) of the FAA, *inter alia*.

In pressing that argument, Argentina recognized that the parties had entered into an "agreement to arbitrate in the present case." Rep. to Mem. of P. & A. at 5, No. 08-cv-485-RBW (D.D.C. Feb. 20, 2009), ECF No. 40. Argentina further conceded that "the Arbitral Tribunal has the principal power to rule upon its jurisdiction." Tr. Hr'g at 4, No. 08-cv-485-RBW (D.D.C. Sept. 28, 2010), ECF No. 55; *see also* Rep. to Mem. of P. & A, *supra*, at 10 ("It is a well known principle that arbitral tribunals have competence to decide their own competence."). Argentina nonetheless asked the district court to "second guess" the tribunal's "decision as to its authority" because "the terms of the consent to arbitration by Argentina were not respected." Tr. Hr'g, *supra*, at 4.

The district court confirmed the award. The court recognized that in light of Argentina's concession that the arbitrators have primary authority to determine their jurisdiction, "any extensive judicial review of the panel's interpretation of the Investment Treaty would be contrary to the Supreme Court's ruling in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)." Pet. App. 42a-43a. The tribunal's ruling could lawfully be overturned only if the tribunal "'strayed from interpretation and application of the agreement and effectively dispensed [its] own brand of industrial justice.'" *Id.* 78a (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1767 (2010) (alterations omitted)).

Applying that standard, the court held that the tribunal was "authorized, if not compelled" by the Treaty to do exactly what it had done: interpret the

Treaty in accordance with international law to determine "that a strict textual interpretation of Article 8(2)(a)(i) would result in an 'absurd and unreasonable result' because Argentina had promulgated 'emergency legislation . . . whose purpose was to bar recourse to the courts by those whose rights were felt to be violated.'" *Id.* 80a. Because "the panel correctly turned to the text of Article 8(2)(a)(i) of the Investment Treaty and relevant international law sources in attempting to discern its jurisdiction to hear BG's claims, and because it relied upon a colorable, if not reasonable, interpretation of these provisions in concluding that the matter was arbitrable," the court concluded that it was "without authority to disturb the panel's conclusions." *Id.*

B. The Court Of Appeals' Decision

Argentina appealed. It again acknowledged that BG and Argentina had entered into an arbitration agreement, to which the Treaty's litigation requirement was a precondition. *E.g.*, Resp't D.C. Cir. Br. 10-11 ("Arbitration agreements are contractual and should be enforced in accordance with their terms. The parties' agreement requires disputes to be submitted to a tribunal in Argentina for 18 months, which BG failed to do."); *see also id.* 15, 16, 18, 19 n.9, 20, 21, 22, 24, 27, 28. Argentina furthermore did not dispute the district court's treatment of its concession that the tribunal had the "principal power to rule upon its juris[illegible]tion." *See* Pet. App. 42a. To the contrary, Argentina "agree[d]" with BG's assessment that only "egregious departures from the parties' agreed-upon arbitration" would be grounds for vacatur – thus embracing the standard that applies when arbitrators resolve matters within their competence. Resp't D.C.

Cir. Reply Br. 10; *see also id.* 16 (arguing that rather than interpret the agreement, the arbitrators imposed their "own brand of industrial justice"). Argentina instead reprised its argument from the district court that the tribunal's interpretation of the arbitration precondition was so egregiously wrong that it was tantamount to ignoring the terms of the parties' agreement.[8]

The D.C. Circuit agreed that the "parties' agreement establish[es] a precondition to arbitration" through the litigation requirement. Pet. App. 2a. It *sua sponte* concluded, however, that Argentina had not expressly conceded in the district court that the tribunal's jurisdictional ruling should be reviewed under the deferential standards of the FAA. *Id.* 12a-13a. And again acting *sua sponte*, the court of appeals held that the question of whether BG was required to comply with the Treaty's litigation precondition was actually an issue of "arbitrability" that is presumptively for a U.S. court to decide. *Id.* 10a. It concluded that "[b]ecause the Treaty provides that a precondition to arbitration of an investor's claim is an initial resort to a contracting party's court, and the Treaty is silent on who decides arbitrability when that precondition is disregarded, we hold that the question of arbitrability is an independent question of law for the court to decide." *Id.* 15a.

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[8] Argentina never disputed that arbitrators presumptively address preconditions to arbitration such as the Treaty's litigation requirement. Argentina argued for the first time in its Reply Brief on appeal that the Treaty overcame that presumption by demonstrating the parties' intent for "the local courts" of Argentina to decide the issue. Resp't D.C. Cir. Reply Br. 13-14.

The court stated that its *de novo* standard of review followed from this Court's holding in *First Options* that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." 514 U.S. at 944 (citation omitted). The court of appeals did not explain why it believed that compliance with the litigation precondition in Article 8 of the Treaty was the type of substantive arbitrability question that would trigger a presumption against arbitrability. Instead, it began with the proposition that the "'gateway' question in this appeal is arbitrability," and stated that the presumption against arbitrability of that question applied for that reason alone. Pet. App. 10a.

The court of appeals found insufficient evidence to overcome the presumption in favor of judicial resolution because, in its view, the Treaty did "not directly answer whether the contracting parties intended a court or the arbitrator to determine questions of arbitrability . . . ." *Id.* 14a. The court also speculated that the parties would have contemplated that the litigation precondition would be enforced by a U.S. court rather than the arbitrators because it requires litigation (albeit in an Argentine court, which is without any power to issue a binding decision). *Id.* 15a.

The court of appeals acknowledged that the Treaty incorporates the UNCITRAL Rules, which assign the arbitral tribunal the authority to resolve any disputes about its jurisdiction. *Id.* 13a. Indeed, the court acknowledged that the UNCITRAL Rules provide the sort of clear and unmistakable evidence that would satisfy even a heightened standard for

determining substantive arbitrability challenges. *Id.* 14a. But the court interpreted the Treaty to provide that those rules were irrelevant on the theory that they "are not triggered until after an investor has first . . . sought recourse, for eighteen months, in a court . . . ." *Id.*

Having determined that the arbitrators' jurisdictional ruling was not entitled to deference, the court of appeals stated that it would interpret the Treaty independently. *Id.* 15a. In contrast with the arbitral tribunal's extensive analysis, *see supra* at 13-14, the D.C. Circuit addressed that question in only two short paragraphs, deeming it dispositive that the Treaty "is explicit" in requiring eighteen months of litigation before arbitration. *Id.* 18a. The court: (1) did not identify or apply the controlling sources of international law (*e.g.*, the Vienna Convention); (2) did not explain why the arbitrators' interpretation of the Treaty was incorrect; (3) did not consider whether Argentina's emergency measures altered the result; and (4) did not consider BG's alternative bases for the tribunal's jurisdiction. Instead, the court of appeals concluded simply that "BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration . . . ." *Id.* 19a-20a.

The court of appeals thus reversed the decision of the district court and entered an order requiring

vacatur of the award. *Id.* 20a.[9] The court denied BG's petitions for rehearing and rehearing en banc. Pet. App. 307a. This Court granted certiorari. 133 S. Ct. 2795 (2013).

SUMMARY OF THE ARGUMENT

The D.C. Circuit's judgment must be reversed for two independent reasons. First, the court of appeals erred in interpreting the FAA to require that a U.S. court, rather than the arbitrators, presumptively determines compliance with the Treaty's litigation requirement. In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002), this Court held that such preconditions to arbitration are subject to the FAA's ordinary rule that the arbitrators decide disputes between the parties. *See also John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 559 (1964). The holding in *Howsam* specifically precludes the D.C. Circuit's contrary view that the Treaty's precondition to arbitration is a question of substantive arbitrability that courts presumptively resolve under the Court's prior decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

This case not only is controlled by *Howsam*'s holding, but also demonstrates the wisdom of the Court's rationale. The arbitral tribunal is more expert

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[9] If this Court affirms the decision below, then on remand the district court would presumably address BG's properly preserved arguments that neither the district court nor the court of appeals has yet considered, including that Argentina's petition to vacate the award was untimely, and that the most-favored-nation clause of the Treaty renders the litigation precondition inoperative.

than a U.S. court in interpreting the Treaty on the basis of the controlling principles of international law. Argentina's jurisdictional objection is also inextricable from the merits of BG's arbitration claim, including BG's challenge to the very measures that obstructed its access to the Argentine courts.

The court of appeals believed that the U.S. courts had primary decisional competence over all arbitrability questions under the Treaty. That view is misguided. No provision of the Treaty anticipates any role for the courts of the nation that hosts the arbitration (here, the United States). Even the Argentine courts have no power to decide anything finally. The Treaty grants the arbitral tribunal alone the power to issue a "final and binding" ruling. Any other rule would have defied common sense and would have erected a significant barrier to the very foreign investment that the Treaty was adopted to encourage. Investors will not risk hundreds of millions of dollars in investment unless they are sure that disputes will be resolved by a neutral and expert tribunal, not the local judicial arm of its government opponent.

In enacting the FAA and then subscribing to the New York Convention, Congress was aware that the essential premise of international arbitration is that a tribunal can be trusted to resolve transnational disputes efficiently, independently, and expertly. Each time domestic courts adopt rules that permit judicial second-guessing of arbitral awards, they encourage obstreperous parties – none of whom is more infamous than Argentina – to launch collateral litigation. The result not only undermines the orderly functioning of the arbitral system, but raises

substantial doubts concerning the efficacy of the entire arbitral regime.

Second, and wholly apart from any presumption regarding the allocation of decisional authority, the parties agreed that the arbitral tribunal would resolve its jurisdictional objection. Argentina entered into the Treaty against the backdrop of the settled principle that arbitrators determine their own jurisdiction. The Treaty embraces that principle by providing that with respect to any dispute – including a dispute over jurisdiction – only the arbitral tribunal may issue a "final and binding" ruling.

Moreover, the Treaty provides that the arbitration will be conducted under the UNCITRAL Rules, unless the parties expressly agree otherwise. Those Rules empower the tribunal to decide jurisdictional disputes. The great majority of courts to consider the question have correctly concluded that a party grants arbitrators the power to decide jurisdictional questions by agreeing to an arbitral system that grants arbitrators that power. The D.C. Circuit's contrary view that the UNCITRAL Rules were not invoked until after BG complied with the litigation precondition makes no sense: irrespective of whether or not the court of appeals agreed with Argentina's jurisdictional objection, the fact remains that under the Treaty, only the arbitrators were vested with the power to make that decision.

Argentina confirmed that understanding in its conduct of both the arbitration and the subsequent challenge to the award. Argentina asked the tribunal to decide its objection, invoking the provision of the UNCITRAL Rules authorizing the arbitrators to determine their jurisdiction. In subsequently seeking

to overturn the award in federal court, Argentina conceded that the tribunal had the principal authority to decide its jurisdiction.

Because the arbitrators had the authority to determine that BG was not required to comply with the litigation precondition, the FAA does not permit a U.S. court to second guess the merits of that ruling. As the district court easily concluded, there is no question that the tribunal consulted the correct materials and applied the correct principles of law, and made its decision on that basis. There is no ground to overturn the tribunal's ruling.

ARGUMENT

This Court should approach warily Argentina's attempt to overturn the international arbitration award in BG's favor. Argentina is infamous for its history of agreeing to arbitrate international commercial disputes, then contesting adverse arbitral awards by every possible judicial means, and then if it still loses, simply refusing to abide by the rulings of the courts to which it submitted the case – particularly, rulings of the American federal courts. "Argentina's strategy can be 'to use all means available to obstruct and delay the arbitration proceedings,' which could exhaust the plaintiff's patience and ward off other potential claimants from bringing cases." Matt Moffett, *Besting Argentina in Court Doesn't Seem To Pay*, Wall St. J. (Apr. 20, 2012), http://online.wsj.com/article/SB10001424052702303425504577356262654410468.html.

The same conduct underlying BG's claim in this case also gave rise to more than thirty other investment treaty arbitrations, resulting so far in four

awards in favor of investors that are no longer subject to any challenge – none of which Argentina has satisfied. Among these was an arbitration instituted under the very same Treaty at issue here by the energy company National Grid (which also did not comply with the litigation precondition). After the district court rejected Argentina's challenge to the award and granted National Grid's cross-motion to confirm the award, and the D.C. Circuit affirmed, this Court denied Argentina's petition for certiorari. *Argentine Republic v. Nat'l Grid Plc*, 637 F.3d 365 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 761 (2011). Nevertheless, Argentina still refuses to recognize this Court's order establishing a final judgment in this case and pay the award, without explanation.

Indeed, Argentina's general disdain for the U.S. judiciary is legendary. For example, in ongoing litigation over the rights of various Argentine bondholders in the Second Circuit, "Argentina's officials have publicly and repeatedly announced their intention to defy any rulings of this Court and the district court with which they disagree." *NML Capital Ltd. v. Republic of Argentina*, No. 12-909, 2013 WL 4487563, at *1 (2d Cir. Aug. 23, 2013). Argentina's refusal to recognize the valid judgments of this nation's courts illustrates its "willful defiance of [its] obligations . . . to honor the judgments of a federal court," *EM Ltd. v. Republic of Argentina*, 720 F. Supp. 2d 273, 304 (S.D.N.Y. 2010), which "is saddling the federal court system in the United States with years of difficult litigation, all because of [Argentina's] adamant refusal to honor the obligations it has incurred pursuant to law." *Id.* at 301. Argentina fights in our courts, but has passed legislation that it will not pay, or settle, U.S. federal court

judgments. *Id.*[10] And while other modern nations have commercial assets around the globe, Argentina repatriates its own to ensure that no judgments can be enforced.[11]

Yet here Argentina affirmatively seeks the assistance of the U.S. federal courts in overturning the arbitral award issued in favor of BG. This Court should not encourage Argentina – and other litigants

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[10] In response to Argentina's pervasive refusal to pay awards issued in favor of U.S. investors, the Administration has gone so far as to strip Argentina of its status as a beneficiary developing country under the U.S. Generalized System of Preferences (GSP). *See* Proclamation To Modify Duty-Free Treatment Under the Generalized System of Preferences and for Other Purposes, 77 Fed. Reg. 18,899, 18,899 (Mar. 29, 2012) ("I have determined . . . that it is appropriate to suspend Argentina's designation as a GSP beneficiary developing country because it has not acted in good faith in enforcing arbitral awards in favor of United States citizens . . . .").

[11] *See, e.g.*, *El Gobierno se protege de los embargos* [The Government Is Protecting Itself from Attachment], La Nación (Arg.) (Feb. 5, 2004), http://www.lanacion.com.ar/570271-el-gobierno-se-protege-de-los-embargos (reporting boasting by Argentina's cabinet chief that reserves of Argentina's Central Bank on deposit in New York banks had been withdrawn, funds on deposit in the New York branch of Banco Nación had been repatriated, and salaries of Argentine officials posted to other countries would be deposited in Argentina or paid in the form of cash sent via diplomatic pouch, which has immunity); *El Nación no teme por las acciones en el exterior* [Banco Nación Does Not Fear Legal Actions in Other Countries], El Cronista (Arg.) (Feb. 16. 2004), http://www.cronista.com/impresageneral/El-Nacion-no-teme-por-las-acciones-en-el-exterior-20040217-0045.html (reporting statements made by the president of Banco Nación that the institution had taken every step necessary to ensure that no asset of the Bank would be attached by Argentina's creditors).

that might consider following its abusive model – by announcing a legal rule that undermines the authority of the parties' chosen arbitral tribunal. For the reasons that follow, the judgment of the court of appeals should be reversed.

I. Under The FAA, It Is The Arbitral Tribunal's Presumptive Responsibility To Determine The Application Of A Procedural Precondition To Arbitration, Such As The Domestic Litigation Provision In Article 8 Of The Treaty.

This Court granted certiorari to decide whether the tribunal, or instead a U.S. court, has the primary responsibility to determine whether BG was precluded from arbitrating its dispute with Argentina as a result of BG's non-compliance with a precondition to arbitration set forth in Article 8 of the Treaty. Under the FAA and this Court's precedents, that responsibility presumptively lies with the arbitrators.

1. In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 941 (1995), the respondents asserted that they were not individually bound to arbitrate a dispute when only their wholly owned investment company had executed an arbitration agreement. This Court held that under the FAA, a court presumptively had the responsibility to decide that question; the arbitrators' ruling on the issue was therefore not entitled to deference. *Id.* at 947. The Court reasoned: "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *Id.* at 943 (citations omitted). Further, "[c]ourts should not assume that the parties agreed to arbitrate

arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* at 944 (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)).

The Court recognized that its decision reverses the ordinary presumption that the arbitrators will determine "*whether* a particular merits-related dispute is arbitrable . . . ." *Id.* at 944 (internal quotation marks omitted). It reasoned that its unique treatment of this gateway dispute was appropriate because the question of *who* decides arbitrability ordinarily "is rather arcane," and a party "might not focus upon that question or upon the significance of having arbitrators decide their own powers." *Id.* at 945.

First Options did not define what gateway matters present a "question of arbitrability" triggering the presumption of judicial determination. The Court addressed that question in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002). There, the petitioner submitted an arbitration claim before the National Association of Securities Dealers (NASD), alleging that she had received bad investment advice from the respondent (Dean Witter). *Id.* at 81. Dean Witter sued to enjoin the arbitration, arguing that the matter was not arbitrable because it was submitted too late under the NASD rules. *Id.* at 82.

The Tenth Circuit held that a court should decide Dean Witter's objection. It read *First Options* to hold that "application of the NASD rule presented a question of the underlying dispute's 'arbitrability'; and the presumption is that a court, not an arbitrator, will ordinarily decide an 'arbitrability' question." *Id.* According to the court of appeals, *First Options*

created a "stringent test for the courts to apply in cases where the parties disagree over who should decide the arbitrability issue," with any ambiguity resolved in favor of courts. *Dean Witter Reynolds, Inc. v. Howsam*, 261 F.3d 956, 964 (10th Cir. 2001).

This Court reversed, explaining that the court of appeals had overread *First Options*. The Court explained that although courts presumptively decide "questions of arbitrability," that phrase does not refer to every "potentially dispositive gateway question," but instead "has a far more limited scope." 537 U.S. at 83. The "narrow circumstance[s]" presenting a question of *substantive* arbitrability, presumptively resolved by a court, include whether a party is bound at all by a particular arbitration clause and whether an arbitration clause applies to a particular type of controversy. *Id.* at 84. By contrast, "'issues of *procedural* arbitrability, *i.e.*, whether prerequisites such as time limits, notice, laches, estoppel, and other *conditions precedent* to an obligation to arbitrate have been met, are for the arbitrators to decide.'" *Id.* at 85 (emphasis altered) (quoting Revised Uniform Arbitration Act § 6(c), cmt. 2, 7 U.L.A. 12-13 (Supp. 2002)). This division of responsibility reflected "the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter," so that "reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Id.* at 83-84.

As a result, the Court held that the applicability of the NASD time bar was presumptively for the arbitrators to resolve. The Court reasoned that the time limit did not constitute a "question of

arbitrability," but was instead "an 'aspect of the controversy which called the grievance procedures into play.'" *Id.* at 85 (alterations omitted) (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 559 (1964)).

As a clear example of an issue of "procedural arbitrability," the Court in *Howsam* cited the holding of *John Wiley*, 376 U.S. at 557, that arbitrators should presumptively decide "whether the first two steps of a grievance procedure were completed, where these steps are prerequisites to arbitration." 537 U.S. at 84. In *John Wiley*, the agreement between an employer and a union included two preconditions to arbitration: the parties had to hold a conference among the affected employee, a union steward, and the employer or an officer of the employer; and then hold a second conference between an officer of the employer and a representative of the union. 376 U.S. at 555-56. Arbitration was permitted only "in the event that the grievance shall not have been resolved or settled" in one of those two steps. *Id.* at 556. After the agreement between the employer and the union was signed, an unforeseen event occurred: the employer was absorbed in a merger, and the newly merged entity denied that it was bound by the agreement (which the union disputed). *See id.* at 545.

In a subsequent dispute, the union bypassed the first two stages of the grievance procedure and submitted a matter directly to arbitration, arguing that the employer's "consistent refusal to recognize the Union's representative status after the merger made it utterly futile – and a little bit ridiculous to follow the grievance steps as set forth in the contract." *Id.* at 557 (internal quotation marks omitted). The employer, for

its part, argued that the union's failure to abide by the preconditions to arbitration rendered the dispute nonarbitrable. *Id.* at 556. This Court held, however, that the jurisdictional dispute concerned a question of procedural arbitrability that was properly resolved by the arbitrator. *Id.* at 557.

2. *Howsam* and *John Wiley* compel reversal of the D.C. Circuit's holding that a U.S. court rather than the arbitral tribunal presumptively decides whether BG was required to comply with the Treaty's litigation precondition. According to *Howsam*, absent contrary agreement, the "question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the question of arbitrability, is an issue for judicial determination"; all other challenges, including whether "conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." *Howsam*, 537 U.S. at 83, 85 (citations and internal quotation marks omitted).

This Court's precedent is therefore clear: absent clear and convincing evidence of a contrary agreement, a dispute concerning compliance with a precondition to arbitration must be decided by the arbitrators. Indeed, the precondition to arbitration in Article 8 of the Treaty closely parallels the NASD time bar at issue in *Howsam*. Just as arbitrators presumptively determine whether arbitration was initiated too late, they likewise determine whether arbitration was initiated too early. *Id.* at 85.

The "narrow circumstances" described in *Howsam* as presenting a question of substantive arbitrability to be decided by courts are not present here. First, there is no doubt that Argentina consented to arbitrate investment disputes with U.K. investors: it executed

the Treaty with the United Kingdom, and the Treaty mandates that arbitrators – not courts – will have the final say in any investment dispute between Argentina and U.K. investors. Second, BG is a qualifying U.K. investor and the subject matter of the parties' dispute in this case falls within the arbitration agreement defined in Article 8 of the Treaty. As a result, substantive "question[s] of arbitrability" are not at issue. The only issue is one of timing – whether, in this case, BG was required to satisfy the litigation precondition before commencing arbitration – which is squarely an issue of procedural arbitrability presumptively reserved for arbitrators.

The facts the Court emphasized in *Howsam* in support of the presumption in favor of arbitral resolution are likewise present in this case. The arbitrators are "comparatively more expert about the meaning of" Article 8 of the Treaty, and "comparatively better able to interpret and apply it." *Cf. id.* at 85. The arbitrators are experts in international law and arbitral jurisdiction, and were appointed for that very reason. *See supra* at 12. They have vastly more experience with BITs than any U.S. court, as well as substantial experience applying principles of international law (including the Vienna Convention) to the interpretation of treaties. Moreover, like the NASD rules incorporated into the parties' agreement in *Howsam*, the UNCITRAL Rules incorporated into the Treaty provide that arbitrators determine the scope of their jurisdiction. *See* 537 U.S. at 86; *see also infra* at 48-49.

3. The D.C. Circuit's efforts to distinguish *Howsam* and *John Wiley* are unpersuasive. Its ruling is inconsistent with the published precedents of every

other circuit to consider the question, all of which uniformly interpret *Howsam* and *John Wiley* to establish a categorical presumption that an arbitral tribunal addresses a party's compliance with a precondition to arbitration. *See, e.g.*, *Dialysis Access Ctr., LLC v. RMS Lifeline, Inc.*, 638 F.3d 367 (1st Cir. 2011); *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388 (6th Cir. 2008); *Lumbermens Mut. Cas. Co. v. Broadspire Mgmt. Servs., Inc.*, 623 F.3d 476 (7th Cir. 2010); *Int'l Bhd. of Elec. Workers, Local Union No. 545 v. Hope Elec. Corp.*, 380 F.3d 1084 (8th Cir. 2004).

The court of appeals dismissed *Howsam* in a footnote. *See* Pet. App. 18a n.6. It opined that "the question of arbitrability" in *Howsam* "arose from a rule, promulgated by the National Association of Securities Dealers," which was also the agency conducting the arbitration. *Id.* But that factual distinction is irrelevant. *Howsam*'s reasoning turned on the type of issue to be resolved (*i.e.*, "substantive" versus "procedural" arbitrability), not on who promulgated the requirement that was allegedly not fulfilled. This Court has not hesitated to apply *Howsam* to arbitration agreements outside the NASD context. *See PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 407 n.2 (2003) (holding, per *Howsam*, that application of a remedial limitation in an arbitration agreement should be decided by an arbitrator even though that interpretation might render the agreement unenforceable).

Nor can *Howsam* be distinguished on the court of appeals' theory that the question of arbitrability in that case (but not here) was intertwined with the facts underlying the merits of the dispute, making the tribunal more expert than a court in resolving the

jurisdictional challenge. *Contra* Pet. App. 18a n.6. In fact, neither *Howsam* nor any subsequent decision of this Court contemplates that courts will decide case by case whether jurisdictional and merits questions were intertwined. That would be a recipe for indeterminacy and inconsistent results in a field that uniquely requires certainty. It would also be a ready roadmap for parties opposing arbitration to initiate collateral court proceedings that would eviscerate the efficiencies of the arbitral process. *See Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008) (noting "arbitration's essential virtue of resolving disputes straightaway" and the desire to avoid "full-bore legal and evidentiary appeals"). Instead, this Court pointed to the fact that procedural arbitrability questions – including whether "conditions precedent to an obligation to arbitrate have been met" – frequently will be intertwined with the merits of an arbitration dispute as a reason for adopting a *categorical* rule that such questions are presumptively for the arbitrator. *See Howsam*, 537 U.S. at 85.

In any event, as the tribunal found, the facts underlying Argentina's invocation of the litigation precondition *are* intertwined with petitioner's case on the merits. Argentina's denial of access to its court system was relevant both to the tribunal's analysis of the precondition to arbitration (the gateway issue), and to its analysis of Argentina's substantive breaches of the Treaty (the merits of the case). *See* Pet. App. 165a-71a, 232a-42a, 283a-84a. For example, the findings that Argentina interfered with its courts' adjudication of property rights, and that it punished investors who sought redress in local courts, were central to both the tribunal's jurisdictional determination, *see supra* at 13-14, and its finding that

Argentina breached the substantive protections owed to petitioner, *see* Pet. App. 242a.

There also is no basis for the D.C. Circuit's view that it was better qualified than the tribunal to interpret the Treaty. Argentina and the United Kingdom knew when entering into the Treaty that in the event of an investor-state arbitration, they could do exactly what Argentina did here: choose arbitrators with expertise in the international law governing the Treaty and give the tribunal a comprehensive presentation of all of the relevant issues during a proceeding much lengthier than the summary confirmation procedure under the FAA, and with a full-blown evidentiary process.

The court of appeals relied on the fact that the Treaty calls for resort to the Argentine courts in the first instance, Treaty art. 8(1), App. 8a-9a, in support of its ruling that the parties to the Treaty expected a court to have the final word with respect to disputes concerning the litigation precondition. But the Treaty does not contemplate that the local courts will decide any question of arbitral jurisdiction. The litigation requirement permits a non-binding decision on the merits of the dispute. By contrast, any effort to vacate the arbitral award for lack of jurisdiction will take place in the state chosen by the parties to host the arbitral proceeding. The investor will almost never agree to site the proceedings in the respondent nation – including because of the prospect of interference by the local judiciary. Proceedings to vacate an award under the BIT thus will be governed by the domestic law of the host nation (here, the FAA). *See supra* at 17-18.

In any event, the Argentine courts have no power to issue a binding ruling on any question, including with respect to compliance with the litigation precondition. Even assuming a decision theoretically could be rendered within eighteen months, *but see* Pet. App. 170a-71a, Article 8 provides that if the parties "remain in dispute," then an investor may submit the matter to arbitration, Treaty art. 8(2), App. 9a. Thus, if BG had disagreed with the decision rendered by Argentine courts, the matter still would have been submitted to arbitration, which would uniquely be final and binding upon the parties – with no provision in the Treaty calling for the arbitrators to defer in any way to the Argentine court's decision. *See id.* art. 8(4), App. 10a.

The Treaty thus creates only a procedural opportunity for the Argentine courts; it does not assign to the judiciary any substantive responsibility. Imagine, for example, that Argentina had not participated in the arbitration but instead had exercised its right to place the dispute before the Argentine courts, and imagine further that those courts had promptly held that BG could not pursue the arbitration without eighteen months of litigation – perhaps even enjoining BG from proceeding to UNCITRAL arbitration. Under the plain terms of the Treaty, if BG disagreed with the Argentine court's rulings (which it obviously would), "the Parties" would "still [be] in dispute," *id.* art. 8(2)(b), App. 9a, and so BG would have had the right to have the arbitrators decide that question anew.

It is not at all surprising that the Treaty is written in this way. Argentina would have recognized that a U.K. company such as BG would be

substantially less willing to invest hundreds of millions of dollars in Argentina if the investor's only protection against the government destroying that investment were that very government's own courts. If the arbitrators were not permitted to determine their own jurisdiction, investors would find themselves in exactly that position. For example, the local courts could frustrate the Treaty-mandated remedy by interpreting the Treaty to require the active pursuit of litigation for eighteen months, but then indefinitely stay that litigation until the termination of emergency measures. Alternately, the courts could enforce a hypothetical emergency decree providing that an investor could not initiate litigation until it first posted a cash bond in the full amount of its claim. Moreover, even assuming that the courts were neutral and fair, the political branches of the government could interfere with the administration of justice by stripping the courts of jurisdiction, staying litigation, or otherwise acting to prevent the submission of disputes to a court. No rational investor would agree to such a regime, especially in a state (such as Argentina) with an uneven history of respect for the rule of law.

The court of appeals' analysis of *John Wiley* is even less persuasive. Like the staged dispute resolution mechanism mandated by the agreement in *John Wiley*, Article 8 of the Treaty imposes procedural preconditions to arbitration. And like the merger in *John Wiley*, Argentina's enactment of emergency measures that sharply restricted access to courts bears on both the issue of procedural arbitrability and on the merits of the dispute.

Nevertheless, the court of appeals distinguished *John Wiley* on the supposed ground that it arose under the National Labor Relations Act, while this case arises under the FAA and the New York Convention, and involves a BIT. Pet. App. 16a-17a. But no less than labor arbitrations, this case is subject to the FAA's "'emphatic federal policy in favor of arbitral dispute resolution.'" *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (quoting *Mitsubishi Motors*, 473 U.S. at 631). This Court has expressly held that even in commercial cases, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Indeed, in *Howsam* – a broker-dealer dispute that had nothing to do with labor relations – the Court applied *John Wiley*'s procedural arbitrability holding.

The court of appeals further distinguished *John Wiley* on the basis that the litigation precondition in the Treaty is different from the informal dispute resolution mechanisms at issue in *John Wiley*. Pet. App. 19a. However, that ignores the reasoning of *John Wiley*, which never suggested that the nature of a particular pre-arbitration dispute resolution mechanism was relevant to whether a court or an arbitrator should determine its applicability or fulfillment. Instead, *John Wiley* was concerned with whether the procedural arbitrability question was likely to be intertwined with the merits so that it would be sensible for the arbitrators to resolve both questions. *See John Wiley*, 376 U.S. at 557. Here, that test is met.

The court of appeals also identified no principled reason why the law would entrust to arbitrators the

decision whether an "informal" negotiation precondition was met, but trust only a court to decide whether the parties had adequately engaged in pre-arbitration litigation. In addition, there is no credible reason to presume that in a treaty between two foreign sovereigns, which did not specify a seat for arbitrations, the parties would have expected a U.S. court to second-guess an arbitral tribunal's determination of arbitrability. *See supra* at 39; *infra* at 55-56.

4. The D.C. Circuit equally erred in asserting that *First Options* supports its ruling that the application of Article 8 presents a "'gateway' question" of "arbitrability." Pet. App. 10a. In fact, the ruling below replicates the precise type of error that this Court reversed in *Howsam*. Like the Tenth Circuit in *Howsam*, the D.C. Circuit here overread *First Options* by requiring a heightened showing of the parties' intent to arbitrate, even though Article 8 of the Treaty does not raise a substantive "question of arbitrability" in the narrow sense that this Court has defined that term.

Further, the present dispute does not implicate the twin rationales of *First Options* in adopting a presumption in favor of judicial determination of the narrow question of "who (primarily) should decide arbitrability." 514 U.S. at 944-45. First, "a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute," and a judicial determination regarding arbitrability preserves the value of that right. *Id.* at 942. But there is no question that Argentina agreed to arbitrate (the Treaty constitutes a standing offer to do so), so there is no risk, unlike in *First Options*, of forcing a

party to arbitrate that never agreed to do so. Moreover, Argentina cannot claim that it has any right to have a court decide the merits because, at most, Article 8 entitles Argentina to an eighteen-month window during which BG litigates the case – while reserving to the arbitral tribunal alone the right to issue a final and binding decision.

Second, *First Options* reasoned that the issue of who decides arbitrability is "rather arcane," so that that parties "might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers." *Id.* at 945. But it is unlikely that Argentina and the United Kingdom simply failed to consider who would determine arbitrability, particularly when they expressly agreed upon the UNCITRAL Rules absent a specific agreement to the contrary by the parties to a particular dispute. While that issue might be "arcane" to those unfamiliar with international arbitration, these two countries have each negotiated dozens of BITs, all at arm's length with sophisticated counterparties. It strains credulity to assume that these sovereign nations – each employing a team of highly experienced negotiators and each facing potential claims for hundreds of millions of dollars – did not "focus upon . . . the significance of having arbitrators decide the scope of their own powers." *Id.*

In this context, as discussed further below, it makes far more sense to conclude that the Treaty was adopted against the settled international norm of "competence-competence," *i.e.*, the presumption that arbitrators have the power to determine their own jurisdiction. Argentina recognized the applicability of that principle in the district court. *See supra* at 23.

That concession was sound, for as a leading text explains:

> The competence-competence doctrine is almost universally accepted in international arbitration conventions, national legislation, judicial decisions, institutional rules and international arbitral awards. Authority in each of these sources recognizes with relative unanimity some version of a competence-competence doctrine. As a consequence, the basic proposition that an international arbitral tribunal presumptively possesses jurisdiction to consider and decide on its own jurisdiction can be considered a universally-recognized principle of international arbitration law.

1 Gary B. Born, *International Commercial Arbitration* 855-56 (2009).

5. The D.C. Circuit's holding that courts should presumptively interpret and apply preconditions to arbitration, such as the staged dispute resolution procedure in Article 8 of the Treaty, has "set the United States courts on a collision course with the international regime embodied in thousands of BITs," which assumes that arbitrators will resolve such procedural arbitrability issues. Professors & Practitioners Cert. Br. 15. Indeed, almost all BITs include staged grievance procedures requiring either a period of negotiation, mediation, or litigation before the commencement of arbitration, including a

significant number of BITs entered into by the United States, as well as the NAFTA.[12]

If Argentina's position were to prevail, dissatisfied parties will have a new way to challenge in court otherwise fair and final arbitrations by arguing that preconditions to arbitration were not satisfied. This "would result in wasteful duplication, unnecessary use of judicial resources, and significant delay." U.S. Council for Int'l Bus. Cert. Br. 22. When, as here, the applicability of preconditions overlaps with the merits of the dispute, the decision would "open[] the door to the full-bore legal and evidentiary appeals that can rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process, and bring arbitration theory to grief in post-arbitration process." *Hall Street Assocs.*, 552 U.S. at 588 (internal quotation marks and citations omitted).

In all likelihood, parties will not risk the inefficiency and unpredictability of a rule permitting courts to second-guess arbitral tribunals. Thus, investors will simply stop agreeing to site arbitrations in the United States. Ultimately, the nation's standing in the international business community would suffer. "[A]ttitudes reflected in U.S. judicial decisions . . . are keenly studied by the global arbitration community. Where those decisions deviate from international arbitral norms supportive of arbitration, the United States' reputation as a venue . . . can be seriously diminished." Am. Arb. Ass'n Cert. Br. 2-3. Indeed, "[t]he D.C. Circuit's decision has already begun to attract scrutiny of and skepticism

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[12] *See* Pet. for Cert. 19-20 & nn.5-7.

about how U.S. courts treat international awards rendered in the United States." *Id.* at 21.

This is an outcome worth avoiding. In enacting the FAA and acceding to the New York Convention, the United States has committed itself to respect and enforce arbitral rulings in compliance with international norms. This Court should not countenance a rule that frustrates that policy.

II. The Treaty Demonstrates, And The Parties In Any Event Agreed, That The Arbitral Tribunal Would Finally Determine Whether Petitioner's Non-Compliance With The Litigation Precondition Precluded Arbitration.

As discussed in Part I, *supra*, a challenge to an award founded on a party's failure to comply with a precondition to arbitration is a matter presumptively for the arbitrators, not the courts. Wholly apart from any presumption, the facts establish that the parties in this case intended to preserve that division of authority. That conclusion follows from: (1) the text of the Treaty; (2) the Treaty's structure, purpose, and context; and (3) the parties' conduct during and after the arbitration. As a result, even if the D.C. Circuit were correct in finding that this Court's holdings in *Howsam* and *John Wiley* were inapposite, the court of appeals still had no justification for reviewing *de novo* the tribunal's determinations with respect to the litigation precondition. Doing so frustrated the parties' expressed intentions.

1. The terms of the Treaty demonstrate that Argentina intended for the arbitral tribunal to decide all gateway issues in a final and binding manner. Argentina negotiated and executed the Treaty –

including its arbitration provisions – against the background understanding that the arbitral tribunal would determine its own jurisdiction. As discussed at length *supra* at 39-41, the text of Article 8 vests only the arbitral tribunal with the power to resolve all disputes finally, including questions relating to compliance with a precondition to arbitration. Treaty art. 8(4), App. 10a. The Treaty thus establishes a process that includes eighteen months of local litigation as a precondition to arbitration, but strips that litigation of any legal significance if no decision is issued in that time period or if the aggrieved investor in any way disagrees with the conclusions of the local courts. Under the terms of the arbitration agreement, therefore, arbitral tribunals *alone* have the power to resolve investor-state disputes – including challenges to arbitrability – and are free to ignore the rulings of a domestic court in the process. *See id.* On the other hand, there is no provision permitting the local court to review the arbitrators' decision.

Perhaps the clearest and most unmistakable evidence that the Treaty incorporates – and does not displace – the settled norm that arbitrators determine their own jurisdiction is its specification that arbitration would be conducted pursuant to the UNCITRAL Rules unless the parties affirmatively agree on another procedure. *Id.* art. 8(3), App. 9a-10a. Those rules expressly and unequivocally grant the tribunal the power to decide any objection to its jurisdiction. *See supra* at 7.[13]

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[13] The result is not changed by the fact that the parties in an individual dispute under the Treaty could hypothetically agree to

When the parties to an arbitration agreement adopt a set of arbitral rules assigning to the arbitrators the power to determine their own jurisdiction, the parties thereby agree to assign the arbitrators that role. This conclusion follows from the core premise that with arbitration agreements, "as with any other contract, the parties' intentions control . . . ." *Mitsubishi Motors*, 473 U.S. at 626. Thus, when parties – and especially sophisticated parties that understand the significance of a set of arbitral rules – agree to incorporate those rules into their agreement, the only result consistent with the intent of the parties is to enforce those rules according to their terms.[14]

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conduct the arbitration under a system other than the UNCITRAL Rules. The only other arbitral system mentioned by the Treaty – ICSID – also grants the arbitral tribunal the power to determine its own jurisdiction. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 41(1), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 ("The Tribunal shall be the judge of its own competence."). But in any event, in every contract providing for a certain arbitral system, the parties are free after the dispute arises to agree to a different set of rules. The dispositive fact is that absent some further separate agreement by the parties, a dispute under the Treaty will be subject by default to the UNCITRAL Rules.

[14] *E.g.*, *Oracle America, Inc. v. Myriad Group A.G.*, No. 11-17186, 2013 WL 3839668, at *5 (9th Cir. July 26, 2013) (finding incorporation of the UNCITRAL Rules to be clear and unmistakable evidence that the parties agreed to arbitrate arbitrability); *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 72-74 (2d Cir. 2012) (finding incorporation of the UNCITRAL Rules to be clear and unmistakable evidence); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th

In this case, it is impossible to conclude otherwise: by selecting the UNCITRAL Rules (absent an express agreement to the contrary), the Treaty plainly requires all jurisdictional disputes to be resolved in the arbitration; and by providing that the decisions of the arbitrators will be final and binding, the Treaty

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Cir. 2012) (finding incorporation of the AAA Rules to be clear and unmistakable evidence); *Thai-Lao Lignite (Thai.) Co. v. Gov't of Lao People's Democratic Republic*, 492 Fed. App'x 150, 151 (2d Cir. 2012) (finding that the arbitral tribunal could rule on its own jurisdiction given the parties' incorporation of the UNCITRAL Rules); *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011) ("By incorporating the AAA Rules, the parties agreed to allow the arbitrator to determine threshold questions of arbitrability."); *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 394 (2d Cir. 2011) (finding incorporation of the UNCITRAL Rules to be clear and unmistakable evidence); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006) (finding incorporation of the AAA Rules to be clear and unmistakable evidence); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332-33 (11th Cir. 2005) (finding incorporation of the AAA Rules to be clear and unmistakable evidence); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989) (finding incorporation of the ICC Rules to be clear and unmistakable evidence). *But cf. DK Joint Venture 1 v. Weyand*, 649 F.3d 310, 317 (5th Cir. 2011) (holding that "where a party attacks the very existence of an agreement," AAA Rules incorporated into that agreement are irrelevant (internal quotation marks omitted)); *China Minmetals Materials Imp. & Exp. Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 288-89 (3d Cir. 2003) (holding that incorporation of the China International Economic and Trade Arbitration Commission Rules was not clear and unmistakable evidence); *Riley Mfg. Co., Inc. v. Anchor Glass Container Corp.*, 157 F.3d 775, 779 (10th Cir. 1998) (holding that there was no clear and unmistakable evidence of an intention to arbitrate arbitrability, despite the parties' agreement to arbitrate under the AAA Rules).

clearly and unmistakably insists that the decisions of the arbitral tribunal should not be subject to *de novo* review.

Two recent examples from the Second Circuit illustrate the correct approach to this question. In *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 394 (2d Cir. 2011), the court of appeals assumed *arguendo* that a challenge to the arbitrators' jurisdiction went to the existence of an arbitration agreement itself, and therefore fell within the narrow circumstances in which clear and unmistakable evidence is required to support an intent to arbitrate arbitrability. The court nevertheless concluded that the incorporation of the UNCITRAL Rules supplied that evidence, explaining that "[b]y signing the BIT, Ecuador agreed to resolve investment disputes through arbitration under the UNCITRAL rules," and therefore "consented to sending challenges to the 'validity' of the arbitration agreement to the arbitral panel." *Id.*

Similarly, in *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 70 (2d Cir. 2012), Thailand challenged the scope of the parties' agreement to arbitrate by arguing that the claimant's investments were not "approved investments" under the relevant BIT. Applying the "clear and unmistakable evidence" standard, the court held that "Thailand's adoption of the UNCITRAL rules providing that the tribunal has 'the power to rule on objections that it has no jurisdiction' is clear and unmistakable evidence of their intent to arbitrate issues of arbitrability . . . ." *Id.* at 73. Accordingly, the court ruled that "a district court considering whether to confirm the award must

review the arbitrators' resolution of such questions with deference." *Id.* at 74.

In this case, Argentina similarly agreed to be bound by the UNCITRAL Rules in arbitrations commenced by U.K. investors. Pet. App. 13a-14a. That fact should have been determinative: Argentina's jurisdictional objection was a matter for the arbitrators, whether it was characterized as a failure to satisfy a precondition to arbitration (*Howsam*), or a challenge to the existence or scope of the arbitration agreement itself (*First Options*). Moreover, by expressly agreeing that the decisions of the arbitrators would be "final and binding," the parties eliminated any lingering doubts as to the effect of the incorporation of the UNCITRAL Rules. Not only did the arbitrators get the first bite at the apple, they were intended to have the only bite.

Indeed, the D.C. Circuit did not disagree. To the contrary it seemingly accepted that the express incorporation of the UNCITRAL Rules would establish "clear and convincing evidence" of the parties' intention to give the arbitral tribunal the power to decide its own jurisdiction. Pet. App. 14a. The court of appeals, however, read the Treaty's litigation precondition as establishing a "temporal limitation" to the application of the Rules – *i.e.*, it concluded that the parties' agreement to use the Rules did not come into effect until after eighteen months of litigation in the Argentine courts. *Id.*

That reasoning begs the question. The point of Article 21(1) of the UNCITRAL Rules is to ensure that the arbitral tribunal will resolve all gateway issues, and for such resolution to be final and binding. However, if one follows the logic of the court of

appeals, the arbitral tribunal's decision with respect to the litigation precondition will only be final and binding if a court agrees with the tribunal's decision. If the court thinks that the arbitral tribunal decided the question incorrectly, then the UNCITRAL Rules never became effective and the decision of the tribunal is irrelevant.

At bottom, the D.C. Circuit's circular reasoning cannot be reconciled with its specific conclusion that the litigation requirement is a precondition to arbitration. *See supra* at 21. When BG submitted its notice of arbitration under Article 8 of the Treaty, BG and Argentina agreed to arbitrate. At that point, there was no "temporal limitation" on the tribunal's authority. As others have noted, "[a]ny precondition to arbitration, such as an obligation to negotiate for a period of time before commencing arbitration, will by definition refer to an event or events that should have preceded the arbitration." Professors & Practitioners Cert. Br. 20.

The D.C. Circuit also erred in its comparison of Articles 8 and 9 of the Treaty. Article 9 regulates disputes between the state parties to the Treaty and calls for the creation of an *ad hoc* tribunal in the event that diplomatic resolution fails. Treaty art. 9(1)-(2), App. 11a. The final sentence of Article 9 states that "[t]he tribunal shall determine its own procedure." *Id.* art. 9(5), App. 12a. According to the D.C. Circuit:

> This provision indicates that the contracting parties were aware of how to provide an arbitrator with the authority to determine a "question of arbitrability," and suggests that the absence of such

> language in Article 8(1) and (2) was intentional.

Pet. App. 14a-15a (citations omitted).

The D.C. Circuit simply misunderstood the meaning of the Treaty's reference to "procedure." In the context of Article 9, the reference to "procedure" relates to the manner in which the arbitrators would conduct the arbitration, not to the court's review of such arbitration. While it is possible that a tribunal constituted under Article 9 would adopt procedures that give the tribunal the power to determine arbitrability challenges, that power does not appear within Article 9 itself. In contrast, Article 8 expressly states that a tribunal would possess the authority to resolve all questions – without reservation – finally and bindingly. There is simply no textual basis for the D.C. Circuit's conclusion that Article 9, but not Article 8, vests arbitral tribunals with the power to determine questions of arbitrability.

2. The essential purpose of the Treaty's dispute resolution provisions confirms that it vests the arbitral tribunal with decision-making authority over jurisdictional objections. The right to arbitration provides would-be investors with the security that their Treaty rights will be enforced by an impartial tribunal, not subject to the vagaries of potentially biased or incompetent local courts. *See supra* at 7; Professors & Practitioners Cert. Br. 11-12 (noting that international arbitration is "the feature that makes these treaties so essential an element of the international economic system" because they "relieve[] investors of any concern that the courts of host countries will be unable or unwilling to provide justice in a dispute between a foreigner and the

government"). The Treaty's requirement that all questions pertaining to arbitral jurisdiction be resolved by the arbitral tribunal, and not by local courts, is essential to the Treaty's key objective: "to create favourable conditions for greater investment by investors of one State in the territory of the other State." Treaty recitals, App. 1a. Argentina no doubt recognized that that goal would be undermined if the Treaty were read to allow the domestic courts of a third state (whose identity will vary from case to case) to review the arbitral tribunal's decisions *de novo*.

In addition, Argentina would have recognized that the arbitral tribunal was the most competent authority to decide its jurisdiction under the Treaty. Allocation to arbitral tribunals of the authority to resolve investor-state disputes finally and bindingly is most consistent with aligning "(1) decisionmaker with (2) comparative expertise." *Howsam*, 537 U.S. at 85. In fact, the parties to this arbitration appointed arbitrators with expertise in the subject matter and law involved in the underlying dispute. The tribunal comprised three eminent jurists, each of whom had considerable experience and expertise in international law, treaty interpretation, and the resolution of foreign investment disputes in Latin America. *See supra* at 12; Am. Arb. Ass'n Cert. Br. 11-12. They, and not the courts, were the "decisionmaker with comparative expertise . . . ." *Howsam*, 537 U.S. at 85.

These arguments have even greater force when it is recognized that the question of relative competence involves a comparison between the tribunal and a court in an unknowable third country. As discussed, disputes under BITs are almost never arbitrated in a contracting state; instead, the parties typically select a

neutral site. In turn, any effort to vacate an award will proceed in the domestic courts of the seat of arbitration under its domestic law. This case is a perfect example: Argentina and BG (a U.K. company) selected the United States as the seat for their arbitration. Argentina then moved in federal district court to vacate the award under the FAA. It is implausible to believe that Argentina contemplated that the U.S. federal courts (which are never mentioned in the Treaty) would be better suited to interpreting its treaty with the United Kingdom than would be an expert tribunal that Argentina participated in appointing.

3. If there were any remaining ambiguity, it is resolved by Argentina's own conduct in proceeding with the arbitration and its subsequent challenge to the tribunal's jurisdictional ruling. In other words, whatever the background understanding in international arbitration, and no matter what the terms of the Treaty provide and its purposes illustrate, Argentina at the very least agreed to submit its jurisdictional objection to the tribunal for decision.

When it received BG's notice of dispute, Argentina did not initiate any action in its own courts to litigate either the merits of the dispute or the jurisdiction of the arbitral tribunal. Instead, it participated in the constitution of the tribunal. The parties then jointly designated the United States as a seat for the arbitration. Even then, Argentina did not initiate an action in a U.S. court under the FAA seeking to enjoin the arbitration on the ground that the tribunal lacked jurisdiction. *See In re Am. Express Fin. Advisors Securities Litig.*, 672 F.3d 113, 141 (2d Cir. 2011) ("If the parties to this appeal have not consented to

arbitrate a claim, the district court was not powerless to prevent one party from foisting upon the other an arbitration process to which the first party had no contractual right.").

Instead, Argentina did the opposite: it presented its jurisdictional objection to the arbitrators. More specifically, it invoked the arbitrators' authority to determine their own jurisdiction under Article 21 of the UNCITRAL Rules. At no point did Argentina suggest to the arbitrators that a court had the power to decide its jurisdictional challenge, and that it made its argument to the arbitral tribunal only out of an excess of caution. Argentina thereby, and again, consented to the tribunal resolving Argentina's jurisdictional objection – finally and bindingly.

Argentina maintained the same posture when it raised its jurisdictional objection in its petition to vacate the award under the FAA. Argentina *affirmatively conceded* that "[i]t is a well known principle that arbitral tribunals have the competence to determine their own competence." Rep. to Mem. of P. & A. at 10, No. 08-cv-485-RBW (D.D.C. Feb. 20, 2009), ECF No. 40. Argentina accordingly acknowledged that the tribunal "has the principal power to rule upon its jurisdiction." Pet. App. 42a & n.8. Argentina's argument was merely that the tribunal contravened Section 10(a)(4) of the FAA, which permits vacatur only in cases of excess of arbitral authority as determined by the application of a deferential standard of review. *See supra* at 19-20. Expressly relying on Argentina's concession, the district court correctly found that its review of the tribunal's jurisdictional determination was deferential. Pet. App. 42a.

In its subsequent brief on appeal, Argentina did not dispute that it had conceded that the tribunal had the principal authority to determine its own jurisdiction. Instead, it continued to argue that the arbitrators' ruling was so outside the bounds of a permissible interpretation of the Treaty that it must be overturned. *See, e.g.*, Resp't D.C. Cir. Reply Br. 5 ("The Tribunal . . . exceeded its authority by allowing BG to arbitrate and such departure from the parties' agreed upon terms is an extreme arbitral conduct [sic] that warrants vacatur."); *id.* at 8 ("Under 9 U.S.C. § 10(a)(4) an arbitral award may be vacated, among other reasons, if 'the arbitrators exceeded their powers' . . . ."); *id.* at 10 ("BG submits in its Initial Brief that an 'egregious departures [sic] from the parties' agreed-upon arbitration' [sic] is a ground for vacatur. Argentina agrees and for that reason this [sic] judicial review is ripe and meritorious.").

Nevertheless, the D.C. Circuit concluded *sua sponte* that Argentina did not in fact concede that the tribunal had the power to rule on its own jurisdiction. That conclusion is unfounded. Argentina's submissions are as clear as its conduct: both confirm that Argentina submitted its jurisdictional challenge to arbitration. And the conclusion is in any event beside the point – for the reasons already given, no concession by Argentina was necessary.

This Court has, in similar circumstances, found that a party consented to an arbitral tribunal's resolution of a jurisdictional challenge. In *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), the petitioner challenged an arbitral tribunal's ruling that the parties' agreement permitted class arbitration. It was unsettled whether that question is

presumptively for the arbitrators or instead for a court to decide. This Court held that the case did not raise the question because the petitioner had consented to the arbitrators' authority by asking the tribunal to decide the issue. "Indeed, Oxford submitted that issue to the arbitrator not once, but twice – and the second time after *Stolt-Nielsen* flagged that it might be a question of arbitrability." 133 S. Ct. at 2068 n.2.

To be sure, by submitting a question to arbitration, a party does not automatically and in every case consent to the arbitrators' authority to decide that question. In *First Options*, non-signatories to an arbitration agreement argued that the dispute was not arbitrable. They presented that question in the first instance to the arbitrators, who disagreed. This Court held that "merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue," when: (1) the presence of a related corporation in the arbitration was "an obvious explanation for the [party's] presence before the arbitrators," and; (2) appellate case law in the jurisdiction at the time indicated that the issue could be presented to the arbitrators "without losing the[] right to independent court review." *First Options*, 514 U.S. at 946. By contrast, Argentina agreed to a set of arbitral rules containing a provision assigning jurisdictional determinations to the arbitrators and then invoked that provision in asking the arbitrators to decide its objection. Further, Argentina never reserved its right to argue to the courts that the tribunal had no authority to rule on its own jurisdiction; to the contrary, Argentina acknowledged that the tribunal had such power. *See supra* at 57-58.

III. The District Court Properly Applied A Deferential Standard Of Review To The Tribunal's Jurisdictional Determination.

The district court concluded that Argentina's jurisdictional challenge was properly within the scope of matters referred to arbitration, and thus reviewed the tribunal's decision under the deferential standard required by Section 10 of the FAA and this Court's precedents. Applying that standard, the district court refused to vacate, and instead confirmed, the award. Pet. App. 21a-91a. That decision was correct, and Argentina has not preserved in this Court any fact-bound challenge to it.

The tribunal rendered its unanimous, 138-page award after four years of pleadings and an eight-day hearing. The award addresses in depth, and ultimately dismisses, Argentina's argument that petitioner's non-submission of the dispute to Argentine courts for eighteen months renders its claims inadmissible. *Id.* 161a-71a. The tribunal found that Argentina had "directly interfer[ed] with the normal operation of its courts" in order to "prevent judicial adjudication and enforcement of property rights," such that requiring petitioner to litigate prior to commencing arbitration would produce an "absurd and unreasonable result" in contravention of the principles of international law governing treaty interpretation (the Vienna Convention). *Id.* 165a-71a; *see supra* at 13-14. The tribunal thus concluded that the fact that the petitioner did not litigate in Argentina for eighteen months was not a bar to arbitration. Pet. App. 171a.

The district court properly applied the standard of review set out in the FAA and in this Court's precedents. The district court began by recognizing

that "judicial review of arbitral awards is extremely limited" and that courts do not "sit to hear claims of factual or legal error by an arbitrator in the same manner that an appeals court would review the decision of a lower court." *Id.* 67a (internal citations omitted). The district court also recognized the "'emphatic federal policy in favor of arbitral dispute resolution' – a policy that 'applies with special force in the field of international commerce.'" *Id.* (quoting *Mitsubishi Motors*, 473 U.S. at 631).

Against that framework, the district court then addressed Argentina's argument that the award should be vacated under Section 10(a)(4) of the FAA because the arbitrators "exceeded their powers" in permitting petitioner to proceed with arbitration without first litigating in Argentine courts. *Id.* 78a. The district court rejected that argument:

> [T]he panel correctly turned to the text of Article 8(2)(a)(i) of the Investment Treaty and relevant international law sources in attempting to discern its jurisdiction to hear BG Group's claims, and it relied upon a colorable, if not reasonable, interpretation of these provisions in concluding that the matter was arbitrable. Under Section 10(a)(4) and controlling case law, the Court is without authority to disturb the panel's conclusions.

Id. 80a.

That is precisely the approach that the FAA and this Court's precedents require of a district court when reviewing decisions on matters submitted to

arbitration. *See, e.g.*, *Oxford Health Plans*, 133 S. Ct. at 2068 ("Under the FAA, courts may vacate an arbitrator's decision only in very unusual circumstances." (citation omitted)); *AT&T Mobility LLC*, 131 S. Ct. at 1752 ("[R]eview under § 10 focuses on misconduct rather than mistake."); *Hall St. Assocs.*, 552 U.S. at 586 (recognizing that the grounds for vacatur in the FAA "address egregious departures from the parties' agreed-upon arbitration" and "extreme arbitral conduct"). The district court's decision should not have been disturbed.

CONCLUSION

For the foregoing reasons, the court of appeals' decision should be reversed.

Respectfully submitted,

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APPENDIX

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE REPUBLIC OF ARGENTINA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

[The equally authoritative Spanish version of the Treaty is omitted.]

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina;

Desiring to create favourable conditions for greater investment by investors of one State in the territory of the other State;

Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States;

Have agreed as follows:

ARTICLE 1

Definitions

For the purposes of this Agreement:

(a) "investment" means every kind of asset defined in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made and admitted in accordance

with this Agreement and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) shares in and stock and debentures of a company and any other form of participation in a company, established in the territory of either of the Contracting Parties;

(iii) claims to money which are directly related to a specific investment or to any performance under contract having a financial value;

(iv) intellectual property rights, goodwill, technical processes and know-how;

(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

A change in the form in which assets are invested does not affect their character as investments. The term "investment" includes all investments, whether made before or after the date of entry into force of this Agreement, but the provisions of this Agreement shall not apply to any dispute concerning an investment which arose, or any claim concerning an investment which was settled, before its entry into force;

(b) "returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees;

(c) "investor" means:

(i) in respect of the United Kingdom:

(aa) natural persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom; and

(bb) companies, corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 12;

(ii) in respect of the Republic of Argentina:

(aa) any natural person, who is a national of the Republic of Argentina in accordance with its laws on nationality; and

(bb) any legal person constituted according to the laws and regulations of the Republic of Argentina or having its seat in the territory of the Republic of Argentina;

(d) "territory" means the territory of the United Kingdom of Great Britain and Northern Ireland or of the Republic of Argentina, as well as the territorial sea and any maritime area situated beyond the territorial sea of the State concerned which has been or might in the future be designated under the national law of the State concerned in accordance with international law as an area within which the State concerned may exercise rights with regard to the sea-bed and subsoil and the natural resources; and any territory to which this Agreement may be

extended in accordance with the provisions of Article 12.

ARTICLE 2

Promotion and Protection of Investment

(1) Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital.

(2) Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

ARTICLE 3

National Treatment and Most-favoured-nation Provisions

(1) Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State.

(2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third State.

ARTICLE 4

Compensation for Losses

Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot or resulting from arbitrary action by the authorities in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State. Resulting payments shall be freely transferable.

ARTICLE 5

Expropriation

(1) Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Contracting Party on a non-discriminatory basis and against prompt,

adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares, the provisions of paragraph (1) of this Article shall apply.

ARTICLE 6

Repatriation of Investment and Returns

(1) Each Contracting Party shall in respect of investments guarantee to investors of the other Contracting Party the unrestricted transfer of their investments and returns to the country where they reside.

(2) Transfers shall be effected without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed between the investor and the

Contracting Party in whose territory the investment was made and in accordance with the procedures established by that Contracting Party. Unless otherwise agreed by the investor transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.

(3) Each Contracting Party shall have the right in exceptional balance of payments difficulties and for a limited period to exercise equitably and in good faith powers conferred by its laws and procedures to limit the free transfer of investments and returns. Such limitations shall not exceed a period of eighteen months in respect of each application to transfer and shall allow the transfer to be made in instalments within that period but the transfer of at least fifty per cent of the capital and of the returns shall be permitted by the end of the first year. In no circumstances may such limitations be imposed on the same investor after a period of three years from the start of the first such limitation. Pending the transfer of his capital and returns, the investor shall have the opportunity to invest them in a manner which will preserve their real value until the transfer occurs.

(4) Notwithstanding the provisions of paragraph (3) of this Article, each Contracting Party shall, in any event, guarantee to the investors of the other Contracting Party, the unrestricted transfer of dividends, which have been distributed to shareholders and paid out of the export earnings of the company concerned.

ARTICLE 7

Exceptions

The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the investors of either Contracting Party or to the investors of any third State shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from

(a) any existing or future customs union, regional economic integration agreement or similar international agreement to which either of the Contracting Parties is or may become a party, or

(b) the bilateral agreements providing for concessional financing concluded by the Republic of Argentina with Italy on 10 December 1987 and with Spain on 3 June 1988 respectively, or

(c) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

ARTICLE 8

Settlement of Disputes Between an Investor and the Host State

(1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled shall be submitted, at the request of one of the Parties to the dispute, to the decision of the competent

tribunal of the Contracting Party in whose territory the investment was made.

(2) The aforementioned disputes shall be submitted to international arbitration in the following cases:

(a) if one of the Parties so requests, in any of the following circumstances:

(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;

(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;

(b) where the Contracting Party and the investor of the other Contracting Party have so agreed.

(3) Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965[1] (provided that both Contracting Parties are

[1] Treaty Series No. 25 (1967), Cmnd. 3255.

Parties to the said Convention) and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

(b) an international arbitrator or *ad hoc* arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If after a period of three months from written notification of the claim there is no agreement to one of the above alternative procedures, the Parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The Parties to the dispute may agree in writing to modify these Rules.

(4) The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in the dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law. The arbitration decision shall be final and binding on both Parties.

(5) The provisions of this Article shall not apply where an investor of one Contracting Party is a natural person who has been ordinarily resident in the territory of the other Contracting Party for a period of more than two years before the original investment was made and the original investment was not admitted into that territory from abroad. But, if a dispute should arise between such an investor and the other Contracting Party, the Contracting Parties agree

to consult together as soon as possible so that they can reach a mutually acceptable solution.

ARTICLE 9

Disputes between the Contracting Parties

(1) Disputes between the Contracting Parties concerning the interpretation or application of this Agreement should, if possible, be settled through the diplomatic channel.

(2) If a dispute between the Contracting Parties cannot thus be settled, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal.

(3) Such an arbitral tribunal shall be constituted for each individual case in the following way. Within two months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State who on approval by the two Contracting Parties shall be appointed Chairman of the tribunal. The Chairman shall be appointed within two months from the date of appointment of the other two members.

(4) If within the periods specified in paragraph (3) of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting

Party or if he too is prevented from discharging the said function, the Member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.

(5) The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Contracting Parties. Each Contracting Party shall bear the cost of its own member of the tribunal and of its representation in the arbitral proceedings; the cost of the Chairman and the remaining costs shall in principle be borne in equal parts by the Contracting Parties. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Contracting Parties, and this award shall be binding on both Contracting Parties. The tribunal shall determine its own procedure.

ARTICLE 10

Subrogation

(1) If one Contracting Party or its designated Agency makes a payment under an indemnity given in respect of an investment in the territory of the other Contracting Party, the latter Contracting Party shall recognise the assignment to the former Contracting Party or its designated Agency by law or by legal transaction of all the rights and claims of the Party indemnified and that the former Contracting Party or its designated Agency is entitled to exercise such rights and enforce such claims by virtue of subrogation, to the same extent as the Party indemnified.

(2) The former Contracting Party or its designated Agency shall be entitled in all circumstances to the same treatment in respect of the rights and claims acquired by it by virtue of the assignment and any payments received in pursuance of those rights and claims as the Party indemnified was entitled to receive by virtue of this Agreement in respect of the investment concerned and its related returns.

(3) Any payments received in non-convertible currency by the former Contracting Party or its designated Agency in pursuance of the rights and claims acquired shall be freely available to the former Contracting Party for the purpose of meeting any expenditure incurred in the territory of the latter Contracting Party.

ARTICLE 11

Application of other Rules

If the provision of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement or if any agreement between an investor of one Contracting Party and the other Contracting Party contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.

ARTICLE 12

Territorial Extension

At the time of the entry into force of this Agreement, or at any time thereafter, the provisions of this Agreement may be extended to such territories for whose international relations the Government of the United Kingdom are responsible, as may be agreed between the Contracting Parties in an Exchange of Notes.

ARTICLE 13

Entry into Force

Each Contracting Party shall notify the other in writing of the completion of the constitutional formalities required in its territory for the entry into force of this Agreement. This Agreement shall enter into force on the date of the later of the two notifications.

ARTICLE 14

Duration and Termination

This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other. Provided that in respect of investments made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of fifteen years after the date of termination and without prejudice to the application thereafter of the rules of general international law.

In witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

Done in two originals at London this 11th day of December 1990 in the English and Spanish languages, both texts being equally authoritative.

For the Government of the United Kingdom of Great Britain and Northern Ireland:

DOUGLAS HURD

For the Government of the Republic of Argentina:

D. CAVALLO

RESPONDENT'S BRIEF

No. 12-138

In the Supreme Court of the United States

BG GROUP PLC,

Petitioner,

v.

REPUBLIC OF ARGENTINA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a federal court with jurisdiction over an application to vacate an arbitral award may independently decide whether a valid and binding agreement to arbitrate has been created under the terms of a bilateral investment treaty?

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STATEMENT

This case concerns the standard of review applied to a dispute about the existence of an agreement to arbitrate between BG Group Plc ("BG") and the Republic of Argentina ("Argentina"). Under this Court's well-established precedent and consistent international practice, courts independently review such disputes, and their decisions are binding. The court of appeals correctly understood Argentina's position to be that it did not consent to arbitrate because BG failed to comply with the controlling terms of Argentina's offer in the treaty between Argentina and the United Kingdom. And the court properly construed the unambiguous text of the treaty in concluding that there was no consent and, therefore, no arbitral jurisdiction. Under any standard of review, the court of appeals' judgment is correct and should be affirmed.

I. FACTUAL BACKGROUND

A. The U.K.-Argentina Treaty

The arbitral award concerns a dispute under a bilateral investment treaty ("BIT") between Argentina and the United Kingdom. *See* Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, U.K.-Arg., Dec. 11, 1990, 1765 U.N.T.S. 33 (the "Treaty"). While BITs often provide for dispute resolution between one contracting State and investors from the other contracting State, they do not always provide for arbitration. Among BITs that do so provide, consent to arbitration may be subject to

limitations on form and content, including conditions precedent that the contracting States require. *See, e.g.*, Brief for the United States as Amicus Curiae in Support of Vacatur and Remand (Sept. 3, 2013) at 20-21 ("U.S. Br.") (describing conditions on States' consent under the U.S.-Korea Free Trade Agreement and the North America Free Trade Agreement ("NAFTA")); *see generally* Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* 427-515 (2010).

Article 8 of the Treaty contains the terms under which Argentina and the United Kingdom offer dispute resolution to investors from the other State. Under Article 8(1), they agree that an investor *must* submit its dispute to the local courts:

> (1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled *shall be submitted*, at the request of one of the Parties to the dispute, *to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made*.

Treaty, art. 8(1) (emphases added).

Article 8(2) contains the contracting States' offers to arbitrate with investors from the other contracting State under limited circumstances, and only when specific conditions to that offer are met:

> (2) The aforementioned disputes shall be submitted to international arbitration in the following cases:

> (a) if one of the Parties so requests, in any of the following circumstances:
>
> > (i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;
> >
> > (ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;
>
> (b) where the Contracting Party and the investor of the other Contracting Party have so agreed.

Treaty, art. 8(2). Accordingly, the States' offers to arbitrate in Article 8(2)(a) do not arise before an investor litigates under Article 8(1), and the domestic tribunal has either not resolved the dispute within eighteen months or has issued a final decision with which the investor remains unsatisfied, whichever occurs sooner. The Treaty does not require exhaustion of local remedies, but requires that an investor resort to domestic courts before an offer to arbitrate arises. The investor cannot bypass the local remedies requirement and arbitrate directly under the terms of the Treaty; it must instead negotiate a separate agreement to arbitrate. *See* Treaty, art. 8(2)(b).

This regime serves important sovereign interests by giving the contracting States an opportunity to resolve disputes before being exposed to international liability through arbitration, and reflects mutual respect between the sovereigns to "permit[] [each] State to

provide an avenue for redress within its own sovereign legal structure." Brief for the United States as Amicus Curiae Opposing Certiorari (May 10, 2013) at 20. It also serves important efficiency objectives by giving local courts the opportunity to provide valuable insight into the terms of local law, *see* Treaty, art. 8(4), which may simplify any later arbitration.

B. Argentina's Response to a Severe Economic Crisis and BG's Claim in Arbitration

BG is a U.K. company that invested in MetroGAS, a privatized Argentine natural gas distribution company operating in Buenos Aires and vicinity. Pet. App. 93a, 102a, 104a, 110a-111a. Under MetroGAS's license, tariffs would be calculated in U.S. dollars (but paid in Argentine pesos) and would be adjusted every six months to account for inflation, in accordance with the U.S. Producer Price Index. *Id.* 111a-113a. By 1998, BG owned 45.11% of MetroGAS. *Id.* 105a.

In 1998, the Argentine economy began to face increasing pressures from decreased availability of capital, particularly following the 1997 East Asian financial crisis and the 1998 Russian default; the collapse of the Brazilian currency and the rise of the U.S. dollar (to which Argentina's currency was pegged); and more restrictive U.S. monetary policy. *See id.* 118a. By 2001, Argentina was in an economic depression, and the country faced "an acute economic, social and political crisis," among the worst in centuries. *Id.*

Argentina adopted several emergency measures to address the severe consequences of the recession.

Among these measures was the Emergency Law enacted in January 2002, formally ending the currency board that artificially pegged the peso to the U.S. dollar, converting U.S. dollar-linked adjustment clauses to peso-based adjustment clauses in agreements, and converting dollar-linked tariffs into peso-based tariffs at one peso to one U.S. dollar. *See id.* 5a.

BG claimed that the economic consequences of these measures effected an expropriation of its investment in MetroGAS and deprived it of fair and equitable treatment, in violation of the Treaty. Pet. App. 132a. In April 2003, BG invoked a purported right to arbitration without first litigating in Argentine courts. *See id.* 94a. In the absence of an agreement between BG and Argentina, the arbitration, under Article 8(3) of the Treaty, was conducted under the Arbitration Rules of the United Nations Commission on International Trade Law (the "UNCITRAL Rules"), G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (1976). *Id.* 97a. The seat of arbitration was Washington, D.C. *Id.* 93a.

From the outset, Argentina consistently objected to the jurisdiction of the tribunal to hear BG's claims because of BG's failure to submit to litigation in Argentine courts in compliance with Article 8(1) of the Treaty. *See* Pet. App. 99a, 134a, 143a-144a, 161a-163a. The tribunal declined to hear and decide the jurisdictional objections before deciding the merits. *Id.* 99a.

BG conceded that it did not comply with Article 8(1), but argued that the local recourse requirement was "senseless as there is no chance that in a case of this nature a decision could ever be rendered within

the eighteen-month period." *Id.* 163a. BG also argued that the Most Favored Nation ("MFN") clause of the Treaty permitted BG to bypass the requirement by taking advantage of the "more favorable" dispute resolution terms in the Argentina-U.S. BIT. *Id.* Finally, BG argued that customary international law permitted it to disregard the requirement if judicial resolution would be "unduly slow or unduly expensive in relation to the prospective compensation." *Id.* 163a-164a.

The tribunal agreed with Argentina that the Treaty requires litigation before Argentina consents to arbitration: "as a matter of treaty law investors acting under the Argentina-U.K. BIT must litigate in the host State's courts for 18 months before they can bring their claims to arbitration." Pet. App. 165a. The tribunal also rejected BG's arguments about the potential length of the court process and customary international law, and did not address BG's MFN argument. *Id.* 164a-165a, 171a.

The tribunal nonetheless excused BG's failure to satisfy the litigation requirement on grounds neither party raised. First, the tribunal pointed to presidential Decree 214/02 adopted in March 2002, which supported the Emergency Law by staying for 180 days "compliance with injunctions and execution of final judgments in lawsuits brought on account of the Emergency Law's effect on the financial system." *Id.* 5a. BG's claims, however, had nothing to do with the financial institutions regulated by the Emergency Law or compliance with an injunction or execution of any final judgment, and in any event the stay ended eight months before BG commenced arbitration. *See id.* 6a.

Second, the tribunal noted that Argentina offered to renegotiate tariffs with utility licensees, excluding licensees that were litigating against Argentina. *Id.* 169a. BG's position before the tribunal, however, was that because it was not a licensee, but instead an investor in one, "the renegotiation process is irrelevant . . . . BG has never participated in the renegotiation process and its claims under the BIT are entirely independent of that process." *Id.* 209a-210a. And in fact, licensee MetroGAS participated fully in the renegotiation process. The tribunal concluded that recourse to Argentine courts was "absurd and unreasonable" and took jurisdiction. *Id.* 165a-171a. The tribunal went on to rule in favor of BG on the merits, awarding BG approximately $185 million. *Id.* 297a.

II. THE LEGAL REGIME GOVERNING INTERNATIONAL ARBITRAL AWARDS

Review of the award is subject to both the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (the "New York Convention" or "Convention"), which is the key international regime addressing the balance between arbitral autonomy and judicial control. The Convention provides for judicial control and supervision over international arbitration and resulting awards, including over awards rendered under BITs. The Convention is implemented through FAA Chapter 2, 9 U.S.C. § 201 *et seq.*, and "provides a carefully structured framework for the review and enforcement of international arbitral awards." *Karaha*

Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 287 (5th Cir. 2004).[1]

The Convention framework is premised on the existence of "primary" and "secondary" jurisdictions for the enforcement of awards. The primary jurisdiction is the State in which, or under the arbitral law of which, the award was made, and the secondary jurisdiction is any other jurisdiction in which recognition and enforcement are sought. The Convention "mandates very different regimes for the review of arbitral awards" in primary and secondary jurisdictions. *Yusef Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997).

The Convention establishes exhaustive grounds for denial of recognition and enforcement in a "secondary" jurisdiction, *see* Convention, art. V, but grants "primary" jurisdictions the broader power to annul awards by providing that an award that "has been set aside or suspended by a competent authority" in a primary jurisdiction may be denied enforcement in a secondary jurisdiction, *id.* at art. V(1)(e). Each primary jurisdiction may decide for itself the grounds on which to vacate awards, and under what standard of review – the Convention "contemplates that the reviewing court will generally apply the set-aside law of the country in which (or under the law of which) the award was made." U.S. Br. 10; *see also Alghanim*, 126 F.3d at

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[1] The exception is awards made under Chapter IV of the Convention on the Settlement of Investment Disputes ("ICSID"). *See* 22 U.S.C. § 1650a(a); *Medellin v. Texas*, 552 U.S. 491, 521-22 (2008) (noting that ICSID and non-ICSID awards "enjoy a different status because of implementing legislation enacted by Congress" and that the latter are subject to Chapter 2 of the FAA).

22 ("There is no indication in the Convention of any intention to deprive the rendering state of its supervisory authority over an arbitral award, including its authority to set aside that award under domestic law."); *Karaha Bodas*, 364 F.3d at 288 (noting courts considering petitions to vacate "may apply their own domestic law" rather than simply the terms of the Convention); W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration* 114 (1992) ("Once a venue or a governing law is selected, the convention gives to it a primacy with regard to the validity of an award.").

The Convention also applies to awards made in the United States that, like this award, involve foreign parties. *See* Convention, art. I(1); 9 U.S.C. § 202. As a result, a U.S. district court may have the role of both a primary and a secondary jurisdiction. As the court with primary jurisdiction because it is where the award was made, the court may vacate the award. *See* 9 U.S.C. §§ 10, 208. But in its role as a court of secondary jurisdiction hearing a petition for recognition and enforcement of an award "not considered as domestic," it may decline recognition based on the grounds provided in the Convention. *See id.* § 207.

III. PROCEEDINGS BELOW

A. Proceedings Before the District Court

In 2008, Argentina filed suit in the United States District Court for the District of Columbia, as the court of primary jurisdiction, seeking to vacate the award under FAA section 10(a)(4) on the grounds that the tribunal exceeded its jurisdiction by excusing BG's non-

compliance with the litigation requirement of Article 8(1) of the Treaty. Pet. App. 64a. BG cross-petitioned to confirm the award.[2] BG acknowledged that the tribunal did not accept its jurisdictional arguments. *See* BG's Mem. of P. & A. 8-10, No. 1:08-cv-00485-RBW (D.D.C. May 15, 2008), ECF No. 11-1 ("BG's Mem. of P. & A."). However, its principal argument to the district court regarding the tribunal's jurisdiction, and the other issues addressed in the arbitration, was that the FAA obligates a court to defer to the tribunal. *See* Pet. App. 64a-68a.

The district court understood that Argentina based its jurisdictional defense on its lack of consent to the arbitration, and in particular:

> that because [the local recourse] condition was not met, it therefore did not consent to arbitrate this dispute, and thus enforcement of the Award would contravene the principle that "arbitration of a particular dispute" is to occur only when "the parties agreed to arbitrate *that dispute*." *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, __U.S. __, __, 130 S. Ct. 2847, 2856 (2010); *see also Stolt- Nielsen*, __U.S. at __, 130 S. Ct. at 1773 (recognizing "the basic precept

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[2] Argentina's petition to vacate was based upon five grounds. The district court issued two opinions, one denying Argentina's petition to vacate, 715 F. Supp. 2d 108 (D.D.C. 2010), and one granting BG's cross-petition to confirm, 764 F. Supp. 2d 21 (D.D.C. 2011). The court's reasoning on the jurisdiction issue is similar in both opinions. The court of appeals later vacated the award based on only one of the grounds raised in Argentina's petition to vacate, the tribunal's lack of jurisdiction, which is accordingly the only issue before the Court.

> that arbitration 'is a matter of consent, not coercion'" (quoting *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989))).

Pet. App. 41a. *See also id.* 64a.

The district court acknowledged that "whether the parties in a dispute 'have agreed to submit a particular dispute to arbitration' is one that is 'typically an issue for judicial determination.'" *Id.* 42a n.8 (internal citations omitted). The district court found that Argentina had forfeited such review because Argentina acknowledged that arbitrators can decide their own jurisdiction, which the court took as a "concession" that it was barred from "any extensive judicial review of the panel's interpretation" of the tribunal's jurisdiction under Article 8. *Id.* 42a-43a. The district court therefore declined to undertake an independent review of whether Argentina consented to arbitrate, instead concluding that its task was to "[a]ccept[], as it must, the arbitral panel's construction of the Investment Treaty." Pet. App. 43a. But Argentina's "concession" was followed immediately by its assertion that the Convention requires a judicial determination of "whether the . . . terms of Argentina's consent to arbitration were respected."[3] The court disregarded

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[3] Tr. of Mots. Hr'g 4:2-7, No. 08-cv-485-RBW (D.D.C. Sept. 28, 2010), ECF No. 55. BG also asserts that Argentina conceded that the parties had entered into an "agreement to arbitrate in the present case." Pet. Br. 20 (citing Reply to Mem. of P. & A. 5, No. 08-cv-485-RBW (D.D.C. Feb. 20, 2009), ECF No. 40 ("Reply to Mem. of P. & A."). This suggestion is refuted by the full sentence from which BG quotes selectively, which explicitly states that arbitration is permitted only after compliance with Article 8(1).

Argentina's assertion of the court's responsibility, considered the tribunal's decision "colorable," and on that basis denied Argentina's petition to vacate and subsequently granted BG's petition for recognition and enforcement. *Id.* 41a-43a. At the same time, the court noted that "under a more searching, appellate-style review, the arguments presented by Argentina in its Petition could very well carry the day." *Id.* 88a-89a.

B. Proceedings Before the Court of Appeals

On appeal, Argentina again argued that the tribunal lacked jurisdiction (and thus exceeded its powers) because Argentina had not consented to arbitrate with an investor who failed to comply with Article 8(1), and that this question of jurisdiction is subject to de novo review. BG contended that deferential review was appropriate because use of the UNCITRAL Rules represented clear and unmistakable evidence that the parties intended to refer questions of arbitrability to the tribunal. *See* Final Br. for Resp't-Appellee 12-14, No. 11-7021 (D.C. Cir. Sept. 21, 2011)

See Reply to Mem. of P. & A. 5. The pleadings BG cites for the same proposition, *see* Pet. Br. 20-22, acknowledge only that Argentina entered into an agreement with the United Kingdom. Argentina has consistently argued that BG's claims do not fall within the terms of that agreement. *See, e.g.*, Reply to Mem. of P. & A. 5; Br. for Pet.-App. 28, No. 11-7021 (D.C. Cir., Sept. 21, 2011) ("Argentina D.C. Cir. Br."). BG's selective quotation of the court of appeals to support the proposition likewise fails. *Compare* Pet. Br. 22 ("The D.C. Circuit agreed that the 'parties' agreement establish[es] a precondition to arbitration' through the litigation requirement." (citation omitted)), *with* Pet. App. 2a (identifying the "parties' agreement" as the Treaty, not an agreement with BG).

("BG D.C. Cir. Br.").[4] Although BG purported to argue in the alternative against "the merits of Argentina's jurisdictional argument," *id.* 15, its defense consisted of asserting that "[w]hether the Tribunal's decision was right or wrong – whether it properly interpreted the factual evidence presented, Article 8 of the Treaty, and [the relevant] provisions of domestic and international law – is of no moment," *id.* 16, and instead it was enough if the tribunal "arguably" interpreted the Treaty, *id.* 17.

The court of appeals recognized that the "'gateway' question in this appeal is arbitrability" – whether the United Kingdom and Argentina, "as contracting parties, intend[ed] that an investor under the Treaty could seek arbitration without first fulfilling Article 8(1)'s requirement that recourse initially be sought in a court of the contracting party where the investment was made[.]" Pet. App. 10a.[5] Like the district court, the court of appeals understood Argentina's position to be that BG's failure to comply with the litigation requirement, a condition of the contracting States' consent to arbitration, precluded

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[4] BG did not argue before either the court of appeals or the district court that compliance with Article 8(1) is a matter of "procedural arbitrability" for the arbitrators to decide. BG raised that argument, and its reliance on *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), for the first time in its petition for rehearing.

[5] Contrary to BG's claim that the court of appeals raised arbitrability on its own, Pet. Br. 22, both parties briefed the question of who decides arbitral jurisdiction within the *First Options* framework. *See* Argentina D.C. Cir. Br. 13, 20-21; BG D.C. Cir. Br. 13-15.

consent and hence arbitral jurisdiction. *See id.* 12a-13a. The court held that the district court committed clear error in asserting that Argentina had conceded that the issue had been committed finally to the arbitrators, *id.*, and decided for itself whether the antecedent legal question – "who decides arbitrability" – was for the arbitrators or the courts, *id.* 15a.

In doing so, the court followed this Court's precedent in holding that it could "not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* 10a (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S 938, 944 (1995)). It found no such evidence and instead noted that "[t]he Treaty provides a prime example of a situation where the 'parties would likely have expected a court' to decide arbitrability" since "the gateway provision *itself* is resort to a court." Pet. App. 15a (citation omitted). Accordingly, the court held that it need not defer to the arbitrators' finding of jurisdiction. *Id.*

In performing its de novo review, the court of appeals noted that the "Treaty provision at issue is explicit," *id.* 18a, and concluded that under the Treaty, "BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration," *id.* 18a-20a. BG's failure to comply with this requirement deprived the tribunal of jurisdiction. Holding that the tribunal had therefore "ignore[d] the terms of the Treaty" and rendered a decision "without regard to the contracting parties' agreement," the court reversed the district court's judgment and vacated the award, *id.* 2a, 20a, finding that "'there can be only one possible outcome on the

[arbitrability question] before us,' namely, that BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration," *id.* 19a (quoting *Stolt-Nielsen, S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758, 1770 (2010)).

The court of appeals denied BG's petitions for rehearing and rehearing en banc. Pet. App. 307a. This Court granted certiorari. 133 S. Ct. 2795 (2013).

SUMMARY OF THE ARGUMENT

The issue before the Court is straightforward: who decides whether Argentina and BG agreed to arbitrate their dispute? The answer reached by the court of appeals, and supported by this Court's precedent and international practice, is that courts decide. This Court should affirm.

I. Arbitration is a matter of contract. Parties cannot be compelled to arbitrate disputes, or to accept the resultant awards, without their consent. The FAA and the New York Convention support that fundamental proposition by establishing an allocation of competence between courts and arbitrators. In particular, this allocation requires that courts decide, independently, whether a party has agreed to arbitrate. Not surprisingly, that is the consistent position taken by this Court and affirmed by the current draft Restatement of the U.S. Law of International Commercial Arbitration. Deferring to arbitrators on this question would assume the conclusion and destroy the consensual nature of arbitration; when the arbitrators' authority to hear the claim is disputed, their decisions as to any issue, including their own

jurisdiction, carry no weight until the court establishes the existence of party consent.

De novo review of the existence of a binding agreement to arbitrate is common among New York Convention jurisdictions. The rule affirmed by the Supreme Court of the United Kingdom, Argentina's treaty partner and the home jurisdiction of BG, is that courts determine independently the scope of the arbitrators' jurisdiction. This includes cases involving BITs. De novo review of consent to arbitration has also been sustained in BIT cases in other major arbitral centers.

Independent judicial review in such circumstances is also consistent with the longstanding principle of competence-competence: arbitrators may determine their own jurisdiction in the first instance – when a challenge is raised, the arbitration does not have to stop dead in its tracks – but that determination is subject to independent judicial control. Competence-competence is embodied in the UNCITRAL Model Law, which reflects an international consensus regarding judicial supervision of arbitration and gives courts the last word when there is a question regarding the arbitrators' jurisdiction.

II. The Treaty by itself does not constitute Argentina's consent to arbitration. It instead contains the States' unilateral offers to arbitrate with investors from the other State who have first submitted their disputes to the appropriate domestic tribunals. To form an agreement, an eligible investor must accept the offer's terms. By attempting arbitration without first submitting its dispute to Argentine courts, BG at best made a counter-offer, which Argentina rejected.

By compelling arbitration despite the absence of an agreement, the arbitrators contrived terms that neither Argentina nor the United Kingdom offered.

Because this case concerns a question of consent, the court of appeals correctly applied de novo review. The dispute in this case does not concern a claims-processing issue like the issues addressed in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), which become relevant only once the court is satisfied that an agreement to arbitrate exists. Nor can it be analogized to the timing issue in *Howsam*, where the issue was whether a dispute that was arbitrable under an undisputed agreement to arbitrate might cease to be arbitrable due to the passage of time. Here, the local recourse requirement precedes the offer, and necessarily any agreement, to arbitrate. The passage of time alone, without submission of the dispute to local courts, cannot give rise to an offer to arbitrate, much less Argentina's consent.

The Treaty's reference to the UNCITRAL Rules does not displace de novo review. The Rules become relevant once an agreement to arbitrate is formed under the Treaty, which did not happen here; and in any event they do not purport to bind parties beyond their consent. As with the UNCITRAL Model Law, the Rules implement competence-competence, allowing arbitrators to decide their jurisdiction, but subject to judicial control. Only the court can decide with finality whether the parties agreed to arbitrate because, in the absence of an agreement, the parties have committed no power to the arbitrators under any set of arbitral rules, let alone provided "clear and unmistakable evidence" of an intent to displace judicial review.

Again, the current draft Restatement affirms this position.

Both BG and the United States agree that when the issue is consent, courts decide. The court of appeals correctly found no consent here, and found the issue so clear that no other conclusion could be reached, even under an "exceedingly narrow" standard of review. Pet. App. 2a. Its conclusion is plainly correct. By compelling arbitration despite the absence of an agreement, the arbitrators substituted their own policy concerns for the terms negotiated by the States themselves, disregarding the sovereignty and efficiency interests underlying the condition of consent in the Treaty. But whatever the tribunal's policy preferences, it had no power to rewrite the Treaty's terms and manufacture Argentina's purported consent out of whole cloth. Remand is therefore unnecessary, and the judgment should be affirmed.

In reaching this conclusion, the court of appeals followed standard treaty interpretation rules, guided by the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S., 331 ("Vienna Convention"), that treaties should be interpreted in accordance with their ordinary meaning. BG complains that the court found the plain meaning to be dispositive, but the plain meaning requires that disputes be submitted to local courts before being submitted to arbitrators. Its objection that the court did not consider its other arguments is incorrect. The court rejected the notion that compliance with the Treaty's local recourse requirement would lead to an absurd or unreasonable result; rather, it is the result the contracting parties – Argentina and the United Kingdom – intended. They

undoubtedly recognized investors might complain that local recourse would take too long or be "futile," but they did not accept such arguments as a basis to excuse compliance. Instead, they agreed that if compliance does not lead to a satisfactory result within eighteen months, the investor may then – but only then – commence arbitration. As the court found, "the contracting parties specifically *desired* 'the delay attendant upon judicial proceedings preliminary to arbitration,'" Pet. App. 17a (emphasis added) (citation omitted), which courts (and arbitrators) are duty-bound to enforce.

Finally, sound policy supports affirmance. First, the court of appeals' review was consistent with the allocation of power between courts and arbitrators under the New York Convention and international practice, and any lesser standard of review would not only make the United States an outlier, but would frustrate the expectations of the Treaty parties. Second, BIT awards implicate important sovereign interests and corresponding comity concerns. They concern the exercise of sovereign powers, generally involve actions taken in the interests of public welfare, and are payable from the public fisc. Reasons of accountability and the legitimacy of the dispute resolution regime argue strongly against diluting the standard of review.

The merits of the emergency measures BG disputed are of course not before this Court; Argentina seeks affirmance of the independent judicial review correctly afforded by the court of appeals in determining that BG failed to accept Argentina's offer to arbitrate, Argentina therefore did not consent to the arbitration,

and the award is a nullity. The judgment should be affirmed.

ARGUMENT

I. UNDER UNITED STATES AND INTERNATIONAL LAW AND PRACTICE, COURTS, NOT ARBITRATORS, HAVE THE FINAL AUTHORITY TO DETERMINE CHALLENGES TO THE EXISTENCE OF AN AGREEMENT TO ARBITRATE

A. This Court's *First Options* Framework Mandates Independent Review of Whether an Agreement to Arbitrate Exists.

Arbitration is always based on the existence of an agreement. Both the FAA and the New York Convention address "agreements in writing" to arbitrate, and the purpose of judicial interaction with arbitration is "to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms,' and according to the intentions of the parties." *First Options*, 514 U.S. at 947 (internal citations omitted); *see also AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) ("'[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960))). This principle underlies the FAA, including the provisions governing review of an award for which the United States is the primary jurisdiction.

Parties cannot be compelled to arbitrate or be bound by an arbitral award unless they have so agreed, and even then, the arbitration is constrained by the terms of that agreement. This fundamental principle cannot be overridden "simply because the policy favoring arbitration is implicated." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). If there is no agreement to arbitrate, the arbitrators have no power, and any act they take, including the assumption of jurisdiction, is a nullity. *See, e.g., John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964).

The competence of arbitrators versus courts to resolve certain threshold or jurisdictional questions with finality flows directly from this bedrock principle. *See AT&T Techs.*, 475 U.S. at 648-49. To address this allocation of competence, the Court has generally referred to "questions of arbitrability." *Howsam*, 537 U.S. at 83; *see AT&T Techs.*, 475 U.S. at 649. That phrase is flexible, but the Court has been clear about its meaning and consequences when the dispute is about the existence of an agreement to arbitrate.

Under the FAA, when the question is the existence, validity, or scope of an agreement to arbitrate – core issues of "arbitrability" – the default presumption is that a court, not an arbitrator, has the final say. *See Howsam*, 537 U.S. at 84 (courts presumptively decide both "whether the parties are bound by a given arbitration clause" and "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy"); *see also Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2858 (2010) ("'[T]he court' must resolve the disagreement." (citation omitted)). BG and its amici concede as much. *See* Pet.

Br. 35; Professors & Practitioners Amicus Br. 27-28; USCIB Amicus Br. 6 n.4. Conversely, "'procedural' questions which grow out of the dispute and bear on its final disposition" are presumptively for the arbitrators to decide. *John Wiley*, 376 U.S. at 557. This is consistent with the Convention's allocation of competence between arbitrators and courts.

In *First Options*, the Court contemplated the possibility that the presumption of independent judicial review of the existence of an agreement to arbitrate could be overcome, but cautioned lower courts "not [to] assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." 514 U.S. at 944 (citations omitted). Absent such evidence, a court must decide the arbitrability question "independently." *Id.* at 943. *See also Granite Rock*, 130 S. Ct. at 2858 (clarifying that in all prior cases in which the Court compelled arbitration, it did so "only after the Court was persuaded that the parties' arbitration agreement was *validly formed* and that it covered the dispute in question and was legally enforceable" (emphasis added)).

First Options did not break new ground but drew on *AT&T Technologies* and the history that case recited. *See* 514 U.S. at 943-944; *see also AT&T Techs.*, 475 U.S. at 648. Similarly, in *John Wiley*, decided more than thirty years before *First Options*, the Court emphasized the "unanimity of views about who should decide the question of arbitrability" and concluded that "[p]ast cases leave no doubt" that it is the courts, not the arbitrators. *John Wiley*, 376 U.S. at 546-47. For this reason, the *First Options* Court found the question

of who decides arbitrability to be "fairly simple." 514 U.S. at 943.

That the Court requires such a high evidentiary bar before deferring to arbitrators on the very existence of an agreement to arbitrate is not surprising. "After all, a contract cannot give an arbitral body any power, much less the power to determine its own jurisdiction, if the parties never entered into it." *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 288 (3d Cir. 2003); *see also, e.g.*, Reisman, *supra*, at 112 ("A ruling by the arbitrators rejecting allegations based on [lack of agreement, Article V(1)(a)] is not dispositive, nor does it function as res judicata for the reviewing court."); U.S. Br. 19.[6] The current draft Restatement of the Law of International Commercial Arbitration synthesizes the position of U.S. courts and comes down squarely for de novo review in this context. Restatement (Third) of the U.S. Law of Int'l Commercial Arbitration § 4-12(d) (Tentative Draft No. 2, Apr. 16, 2012) ("[A] court determines de novo (1) the existence of the arbitration

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[6] While this Court in *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010), deferred to the arbitrators as to the unconscionability of an agreement to arbitrate based on an agreement that gave the arbitrator "exclusive authority" to decide the "validity" of the agreement, *id.* at 2779, there is no such agreement in this case. The *Rent-A-Center* Court was careful to emphasize that "[t]he issue of the agreement's 'validity' is different from the issue whether any agreement between the parties 'was ever concluded.'" *Id.* at 2778 n.2. And when the Court first framed the possible exception to independent judicial review where "the parties clearly and unmistakably provide otherwise," it was as to the scope and not the existence of an agreement to arbitrate. *AT&T Techs.*, 475 U.S. at 649.

agreement."); *see also id.* § 4-12, cmt. d; *id.* at reporter's note d. Without independent review, the consensual essence of arbitration would be lost. Arbitrators could arrogate authority not conferred by the parties, and if courts defer to such erroneous decisions, they will have assumed away the question of consent on which arbitration is based.

B. International Practice Also Dictates Independent Judicial Determination of Whether the Parties Have Agreed to Arbitrate, Including in Investment Treaty Cases.

The practice of independent review of the existence of an agreement to arbitrate is common across New York Convention jurisdictions. "[I]nternational law overwhelmingly favors some form of judicial review of an arbitral tribunal's decision that it has jurisdiction over a dispute, at least where the challenging party claims that the contract on which the tribunal rested its jurisdiction was invalid." *China Minmetals*, 334 F.3d at 289; *see also* U.S. Br. 24 ("[C]ourts in several States that commonly serve as seats for investor-state arbitration generally review de novo whether an arbitration agreement exists.").

Significantly in this case, it is well established in the United Kingdom that a court need not defer to the arbitrators as to whether an agreement to arbitrate exists. *See Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Gov't of Pakistan*, [2010] UKSC 46, [12], [31] (appeal taken from Eng.). *Dallah* was merely a confirmation of existing United Kingdom practice. *See id.* at [24]-[25]. In an earlier case involving a challenge to a BIT award made in

England, the English Court of Appeal affirmed that there is no basis "for suggesting that there is or should be any difficulty about an English Court, in the context of an English award, determining the scope of arbitrators' jurisdiction." *Occidental Exploration & Prod. Co. v. Republic of Ecuador*, [2005] EWCA Civ. 1116, [55].

As in *Occidental*, the international practice of de novo review encompasses disputes relating to the jurisdiction of arbitral tribunals to the same degree whether premised on investment treaties or commercial agreements. This rule is applied in other arbitral centers:

> Canada: The court applies a standard of "correctness, in the sense that the tribunal had to be correct in its determination that it had the ability to make the decision it made." *Mexico v. Cargill, Inc.*, [2011] ONCA 622 para. 42 (Can. Ont. C.A.) (NAFTA decision).
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> France: "When examining the meaning and the scope of the arbitration agreement contained in . . . provisions of the BIT, the court makes an *independent* factual and legal examination of the grounds and arguments of the parties." Cour d'Appel, Paris, 1e ch., 25 September 2008, J.F. Périé (Fr.) 3 (emphasis added).
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> Germany: German courts decide independently of the arbitral tribunal whether the dispute falls within the scope of arbitration permitted by the investment treaty between Germany and Thailand. Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 30, 2013, Case No. III ZB 40/12 paras. 15-17.

The Netherlands: A tribunal's determination of its own competence under a BIT "has to be fully reviewed by the court." Rb.'s-Gravenhage 2 mei 2012 (Republic of Ecuador / Chevron Corp.) para. 4.5 (Neth.).

Sweden: An arbitral ruling on jurisdiction under a BIT "does not, however, prevent a court . . . from ruling on the jurisdictional issue. The court's decision on the matter will have legal force and be binding on the arbitrators . . . . [A] decision by the arbitrators to the effect that they have jurisdiction to try the case *is not binding* . . . ." [Supreme Court] 2010-11-12, Ö2301-09 (Swed.) para. 5 (emphasis added).[7]

C. The Background Principle of Competence-Competence Prescribes That the Arbitrators' Power to Determine Their Own Jurisdiction Is Subject to Independent Judicial Review.

Contrary to the suggestions of BG and its amici, Pet. Br. 45; USCIB Amicus Br. 12 n.12; AAA Amicus Br. 13-14, the principle of competence-competence simply provides that arbitrators may decide challenges to their own jurisdiction subject to independent judicial

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[7] Copies of the French, German, Dutch, and Swedish judgments cited above, with certified translations, have been lodged with the Clerk. This consistent State practice belies the claim that the court of appeals' decision will undermine the United States' role as an international arbitral center. *See* Pet. Br. 26-27, 46-47; USCIB Amicus Br. 24; AAA Amicus Br. 18-26.

control.[8] In *China Minmetals*, the Third Circuit catalogued and relied on consistent international practice framed by competence-competence in affirming that the arbitrators' power to decide their own jurisdiction does not displace ultimate judicial control in determining the existence of an agreement to arbitrate. The court thus ordered the district court to "make an independent determination of the agreement's validity." 334 F.3d at 289-90.[9] The Third Circuit observed that the UNCITRAL Model Law,

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[8] BG's own sources undermine its proposition. In the sentence immediately succeeding the passage quoted by BG, Pet. Br. 45, Mr. Born confirms that "the competence-competence of arbitral tribunals to consider and decide jurisdictional challenges [is] *subject to subsequent judicial review*." Gary B. Born, *International Commercial Arbitration* 856 (2009) (emphasis added). As another standard text explains:

> In its simplest formulation . . . when one side says the arbitration clause is invalid, there is no need to halt proceedings and refer the question to a judge. However, under this brand of *compétence-compétence* the arbitrators' determination about their power would be subject to judicial review at any time, whether after an award is rendered or when a motion is made to stay court proceedings or to compel arbitration.

W. Lawrence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration* § 28.07(a)(i) (3d ed. 2000). *See also* Zachary Douglas, *The International Law of Investment Claims* 147 (2009) ("[T]he tribunal should not have the final word on the issue of whether or not it is vested with adjudicatory power.").

[9] The concurrence expressly rejected the proposition that "the Convention requires the District Court to assume that the tribunal's determination [as to its own jurisdiction] was correct." *China Minmetals*, 334 F.3d at 293 (Alito, J.).

which provides for "court control" of arbitrators' jurisdictional decisions, supports the conclusion that the independent review mandated by *First Options* is entirely consistent with international practice. *China Minmetals*, 334 F.3d at 289; UNCITRAL Model Law, Explanatory note by the UNCITRAL secretariat para. 25, U.N. Doc. A/40/17 annex 1 (1994).[10]

Indeed, the UNCITRAL Model Law represents "an international consensus on the appropriate role for national courts in performing control functions in international commercial arbitration . . . [and] represents a clear commitment to the national judicial role contemplated in the New York Convention." Reisman, *supra*, at 126-27. The UNCITRAL Model Law follows the principle of competence-competence and is clear that "[t]he arbitral tribunal's competence to rule on its own jurisdiction, i.e. on the very foundation of its mandate and power, is, of course, subject to court control." UNCITRAL Model Law, Explanatory note by the UNCITRAL secretariat para. 25. The Model Law thus provides for judicial review of a tribunal's decision on the existence and validity of an agreement to arbitrate, whether made preliminary to, or joined with, the merits. *See* UNCITRAL Model Law, arts. 16, 34, 36; *see also id.*, Explanatory note by the UNCITRAL secretariat paras. 24-25. The English position with respect to competence-competence is

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[10] *See, e.g.*, *TCL Air Conditioner (Zongshan) Co. Ltd. v. Judges of the Fed. Court of Australia*, [2013] HCA 5 para. 12 (Austl.) (Under the Model Law, arbitrators' jurisdiction "is an objective question to be determined by the competent court on the evidence and submissions before it, unaffected by the competence of an arbitral tribunal to rule on its own jurisdiction.").

consistent with the UNCITRAL Model Law: "Arbitrators are entitled, and indeed required, to consider whether they will assume jurisdiction. But that decision does not alter the legal rights of the parties, and the court has the last word." Johan Steyn, *England's Response to the UNCITRAL Model Law of Arbitration*, 10 Arb. Int'l 1, 5 (1994).

In short, well-established U.S. law and consistent international practice confirm that the court, and not the tribunal, has the final say in Argentina's challenge to the existence of an agreement to arbitrate.

II. THE COURT OF APPEALS CORRECTLY DECIDED THAT THE TRIBUNAL LACKED JURISDICTION DUE TO THE ABSENCE OF CONSENT TO ARBITRATE

The court of appeals correctly applied this Court's precedent, consistent with international practice, in concluding that independent review is proper. Its decision that the only possible conclusion is that the arbitral tribunal lacked jurisdiction, because there was no agreement to arbitrate with BG under the plain text of the Treaty, is correct. Moreover, its analysis demonstrates that the award cannot stand even under a more deferential review.

A. The Court of Appeals Correctly Conducted an Independent Review of Argentina's Consent.

1. The Court of Appeals Properly Construed Argentina's Objection Under Article 8 as an Objection to Its Consent to Arbitration.

The court of appeals correctly understood Argentina's position to be that there was no valid agreement to arbitrate between the parties. This is plain from the court's reliance on the *First Options* framework, *see* Pet. App. 10a, as well as from its focus on Argentina's statement that "'[t]he fundamental issue[] here . . . is that [under the terms of the Treaty] Argentina's consent to arbitration had a very important condition. And that condition was that the dispute had to be submitted for 18 months to local courts to an Argentine judge.'" *Id.* 13a.[11]

The district court sidestepped the issue of consent by relying on a supposed concession that Argentina never made. *See supra*, at 11-12. BG thought so little of the "concession" that it did not even mention it before the court of appeals, which expressly overruled the district court's finding as clearly erroneous. Pet. App. 13a. BG's current attempt to renew this "concession," *see, e.g.*, Pet. Br. 57, is unavailing. The court of appeals correctly rejected the "concession," noting that Argentina then stated that "[the court] has

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[11] BG errs in relying on Argentina's participation in the arbitration as a waiver of Argentina's ability to raise this objection in court. Pet. Br. 59. *See, e.g.*, *First Options*, 514 U.S. at 941, 946-47; *China Minmetals*, 334 F.3d at 290.

the right to and the duty to under the New York Convention to assess whether . . . Argentina's consent to arbitration [was] respected," Pet. App. 12a (quoting Tr. of Mots. Hr'g 4:4-7 (Sept. 28, 2010)), and found this to be a straightforward issue of consent.

BG's submission of a notice of arbitration was not made under any existing agreement between Argentina and BG. *See id.* 17a (noting that this case does not concern an agreement to arbitrate between BG and Argentina, but instead "an international investment treaty between two sovereigns"). The only pre-dispute agreement was the Treaty between Argentina and the United Kingdom. *Id.* 2a. As the United States explains, the Treaty, like most other investment treaties, "sets forth a host State's standing offer to arbitrate certain categories of disputes with a class of investors from the other contracting State, and the 'offer includes the various terms and conditions contained in the * * * investment treaty.'" U.S. Br. 16 (citation omitted). A BIT is thus different from typical commercial arbitration agreements between two private parties.

To form a binding agreement, therefore, an eligible investor must accept the offer on the terms it was made. Under the Treaty, an investor's dispute "shall be submitted" for resolution by the domestic tribunals of the respective host State, Treaty, art. 8(1), and the contracting States extend an offer to arbitrate only after that submission has been properly made, *id.* at art. 8(2)(a). Because Article 8(2)(a) "explicitly *requires* judicial proceedings prior to arbitration," Pet. App. 17a, an investor who wishes to commence an arbitration without prior recourse to local courts as provided in

Article 8(1) must negotiate a separate agreement under Article 8(2)(b), which no one suggests occurred here.

The investor therefore cannot accept the offer in Article 8(2)(a) without having submitted the dispute to the host State's tribunals in accordance with Article 8(1). Requesting arbitration without complying with Article 8(1)'s local recourse requirement – as BG attempted here – constitutes not acceptance, but instead a counter-offer. Unless accepted by the counterparty, a counter-offer cannot create a binding agreement between the parties.[12] Here, Argentina rejected the counter-offer and thus never consented to arbitration with BG; because a "tribunal's jurisdiction is limited by the terms of the parties' consent," Vandevelde, *supra*, at 433, the tribunal lacked jurisdiction to hear the dispute.[13]

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[12] *See* Douglas, *supra* note 8, at 76 ("In other words, if the investor claimant, in its notice of arbitration, purports to modify those terms in any respect, then that would constitute a counter-offer and the respondent host state would have to accept those new terms concerning the arbitral tribunal's jurisdiction in a separate legal instrument.").

[13] The court of appeals rightly contrasted Article 9, which provides for arbitration between the contracting States, with Article 8's requirement that parties first litigate. Pet. App. 14a. BG's criticism misses the point. *See* Pet. Br. 53-54. The significance is not the reference to "procedure" in Article 9, but instead that Article 9 (and not Article 8) represents a contemporaneous agreement to arbitrate reached "*between the contracting parties themselves*, the United Kingdom and Argentina," Pet. App. 14a (emphasis added), rather than a unilateral offer to arbitrate, only following litigation, extended to hypothetical future investors.

It is wrong to suggest that "the Argentine courts have no power to issue a binding ruling on any question" and that Article 8(1) can be ignored because the Treaty "does not assign to the judiciary any substantive responsibility." Pet. Br. 40. As a practical matter, an Argentine judicial determination would bind *Argentina* – it is difficult to imagine the State commencing international arbitration to contest the judgment of its own courts. But even if the investor ultimately sought further or different relief through arbitration, the decisions of domestic tribunals could inform the terms of the arbitration – because in addition to the terms of the Treaty, any dispute is also governed by "the law[] of the Contracting Party involved in the dispute," Treaty, art. 8(4), a definitive construction of Argentine law might constrain debate in a follow-on arbitration and contribute to its resolution.

Thus while the Treaty does not *necessarily* give the local courts "final say," *see, e.g.*, Pet. Br. 7, 54, it clearly requires for good reason that local courts be afforded the *first* say in a dispute, before an arbitration may be commenced, *supra*, at 3-4. In any event, whether a domestic tribunal can bind the parties is irrelevant – the United Kingdom and Argentina negotiated for and agreed to require the submission of the dispute to local courts, without which no offer to arbitrate, much less an agreement, comes into being.[14]

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[14] BG argues that Argentina could have submitted the dispute for judicial resolution, *see* Pet. Br. 11, seemingly contradicting its claims regarding access to the Argentine courts. But in any event, Argentina was not the party bringing a dispute; it had no power to submit BG's dispute to domestic tribunals or to satisfy BG's

2. Because Argentina's Objection Was to Its Lack of Consent, the Court of Appeals Properly Applied Independent Review.

Because the issue here is consent to arbitration – the very existence of an agreement to arbitrate – the court of appeals correctly distinguished cases relating to procedural requirements (or "preconditions") contained within an arbitration agreement whose existence is not at issue. It found that this case is unlike *John Wiley*, on which BG now so heavily relies but never cited below. *John Wiley* presented two different issues of "arbitrability." The first is the one

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obligations under the Treaty, and was certainly not required to do so.

BG's additional claim, Pet. Br. 56-57, that Argentina should have applied to courts in the United States to enjoin the arbitration likewise fails. First, BG provides no legal basis why such supervisory power exists at the start of the arbitration but, as BG seems to argue, disappears after it concludes. To the contrary, FAA § 10(a)(4) and New York Convention Art. V(1)(a) explicitly permit judicial review of a jurisdictional determination after the arbitrators err in taking jurisdiction, either through annulment or recognition and enforcement proceedings. *See supra*, at 7-9. Second, there is considerable doubt whether U.S. courts may go beyond that authority to enjoin arbitrations subject to the Convention. *See Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 391 (2d Cir. 2011) (noting that whether "courts lack the power to stay BIT arbitration" is "an open question in [the Second] Circuit," and declining to decide the issue); *see also* Jennifer L. Gorskie, *US Courts and the Anti-Arbitration Injunction*, 28 Arb. Int'l 296, 300 (2012). BG's reliance on *In re Am. Express Fin. Advisors Sec. Litig.*, 672 F.3d 113 (2d Cir. 2011), is misguided. That case was decided on the basis of "the particular circumstances presented in [that] appeal," and the court expressly declined to decide the question more generally. *Id.* at 141 n.20.

presented here – whether there was an agreement to arbitrate – which the Court held was for the courts, and not the arbitrators, to decide. *See John Wiley*, 376 U.S. at 546-47. The second issue concerned compliance with the terms of the grievance procedure contained within the collective bargaining agreement which, in the first step, the Court had held bound the parties. *See id.* at 554. While BG ignores the first step in favor of the second, the court of appeals properly understood the difference, noting that "[i]n *John Wiley*, the Court drew a distinction between 'substantive' questions of arbitrability and 'procedural' questions of arbitrability, assigning the former to courts and the latter to arbitrators." Pet. App. 16a (citing *John Wiley*, 376 U.S. at 557). The litigation requirement in this case raises "a fundamentally different question of arbitrability [] than that of the ignored informal resolution steps in *John Wiley*," Pet. App. 19a, properly classifying the condition on Argentina's consent as a "'substantive' question[] of arbitrability," *id.* 16a.[15]

The court of appeals therefore properly followed *Howsam*'s guidance that gateway issues for courts to

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[15] The tribunal likewise found that the litigation requirement of Article 8 is a condition of Argentina's consent to arbitrate, *see supra*, at 6, as did another tribunal interpreting Article 8, *see ICS Inspection & Control Servs. Ltd. v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, ¶ 262 (Feb. 10, 2012). Other tribunals interpreting similar provisions in other Argentine BITs have also determined that the eighteen month requirement is a condition of Argentina's consent to arbitrate. *See Daimler Fin. Servs. AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, ¶ 194 (Aug. 22, 2012); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, ¶ 116 (Dec. 8, 2008).

decide are those that may "'avoid[] the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.'" Pet. App. 11a (quoting *Howsam*, 537 U.S. at 83-84). BG has it backwards by arguing that "the precondition to arbitration in Article 8 of the Treaty closely parallels the NASD time bar at issue in *Howsam*" on the supposed basis that "[t]he only issue [implicated by Article 8] is one of timing." Pet. Br. 35-36. In *Howsam*, there was no dispute that the parties had an agreement to arbitrate and that Howsam's claim was subject to that agreement when it accrued. *See* 537 U.S. at 81. The dispute was whether an admittedly arbitrable claim might cease to be arbitrable because of the passage of time. Here, in contrast, the passage of time alone – in the absence of submission of the dispute to Argentina's domestic tribunals in accordance with Article 8(1) – can do nothing to turn BG's non-arbitrable claim into one that is arbitrable.[16]

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[16] BG seeks to rely upon *Howsam* for the proposition that arbitrators decide not only when a claim has been submitted too late – the issue in that case – but also "whether arbitration was initiated too early." Pet. Br. 35 (citing *Howsam*, 537 U.S. at 85). But *Howsam* makes no such claim. The Court in *Granite Rock*, on the other hand, dealt explicitly with an arbitration that had potentially been initiated "too early" – before the ratification of the agreement to arbitrate – and held that the issue was for the court. 130 S. Ct. at 2860-61; *see also id.* at 2860 ("*[W]hen* a contract [to arbitrate] is formed can be as critical as *whether* it was formed."). And in *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 208-09 (1991), the Court decided for itself whether claims were "too late" because they arose after expiration of the relevant agreement. The distinguishing factor is thus not timeliness, per se, but rather whether the existence of an agreement to arbitrate is in dispute. In any event, the question in this case is not timing, since BG was

If the rule of *Howsam* were as BG seeks to cast it, defining even this issue as one of "procedural arbitrability," the exception would swallow the rule because consent itself is by definition a "condition precedent to an obligation to arbitrate," 537 U.S. at 85, as all arbitration is a creature of consent. But the issues of "procedural arbitrability" that *Howsam* said are for arbitrators – "'prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate,'" *id.* (citation and emphasis omitted) – are all claims-processing "conditions" relevant only once an agreement to arbitrate exists, *i.e.*, only after resolution of the "gateway dispute about whether the parties are bound by a given arbitration clause," *id.* at 84. *Howsam* recognized the bright-line rule that the specific "gateway dispute about *whether the parties are bound by a given arbitration clause* raises a 'question of arbitrability' for a *court* to decide." *Id.* at 84 (emphases added) (quoting *First Options*, 514 U.S. at 946); *see* Pet. App. 15a.[17]

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not required merely to wait for a certain time to pass, but instead to submit the dispute to a court for potential resolution to satisfy a condition to Argentina's offer to arbitrate.

[17] The United States cautions to focus on the substance of the condition, not the label. *See* U.S. Br. 15. The Court likewise has cautioned against insisting on "talismanic words" in treaty provisions. *See Medellin*, 552 U.S. at 521. Because Argentina has consistently contended this is an issue of consent – "a so-called 'question of arbitrability,'" *see Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013) – and as discussed below there is no relevant agreement by which Argentina committed the issue to the arbitrators, the issue is properly preserved for this Court.

3. Independent Judicial Review Is Not Displaced by the Treaty's Reference to the UNCITRAL Rules.

The reference to the UNCITRAL Rules in the Treaty does not provide any evidence, much less the "clear and unmistakable evidence" contemplated by *First Options*, that Argentina and the United Kingdom intended to overturn the well-established presumption of judicial control with respect to issues of consent.

The court of appeals properly observed that the UNCITRAL Rules can have effect "only after an Argentine court first has an opportunity to resolve the dispute," that is, only "once the possibility of [a valid] arbitration is triggered." Pet. App. 13a. BG's argument – which is premised on the prior existence of an "agreement" to arbitrate that incorporates the UNCITRAL Rules, *see, e.g.*, Pet. Br. 49 – is a non-sequitur that fails to acknowledge that BG is not a party to the Treaty or any other relevant agreement with Argentina. Here, the UNCITRAL Rules did not apply "presumptively," Pet. Br. 7, but as a default rule of procedure precisely because there was no agreement to arbitrate between BG and Argentina that incorporated any arbitral rules at all. Treaty, art. 8(3)(b). The Treaty referenced the UNCITRAL Rules simply to supply the procedure for a particular class of arbitration, not to supplant the contracting States' agreement that arbitration – under *any* rules – may be commenced only when the investor has previously submitted its dispute to local tribunals. That never happened here.

In any event, the UNCITRAL Rules do no more than incorporate the principle of competence-

competence, which as discussed above holds that it is the arbitrators who decide first – *not* finally – any jurisdictional objections. *See supra*, at 26-29. That the UNCITRAL Rules do not displace independent judicial review is confirmed by leading commentaries on those Rules. *See, e.g.*, David D. Caron et al., *The UNCITRAL Arbitration Rules* 445-46 (2006) (noting that while "[t]he power of tribunals to determine their own jurisdiction . . . is generally thought to exist as an inherent power of the tribunal . . . any awards of the arbitral panel might be subject to challenge under the applicable law for excess of jurisdiction"); Howard M. Holtzmann & Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 479 (1994) ("The arbitral tribunal's power is neither exclusive nor final. Its decision is subject, first, to immediate review by a court . . . , second, to later court review in a setting aside procedure . . . , and, third to still later review in an action for recognition and enforcement . . . ."). The UNCITRAL Model Law and Rules operate in tandem to allow arbitrators to decide their jurisdiction, but subject to de novo judicial review; without such review "the Model Law would be a monster of incoherence and deception." Richard W. Hulbert, *Institutional Rules and Arbitral Jurisdiction: When Party Intent Is Not 'Clear And Unmistakable'*, 17 Am. Rev. Int'l Arb. 545, 570-71 (2006).[18]

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[18] The same rule – arbitrators may decide their own jurisdiction, but subject to independent judicial control – is well recognized as being operative with respect to institutional arbitral rules as well. *See, e.g.*, Craig, Park, & Paulsson, *supra* note 8, § 28.07 (article 6 of ICC Rules conferring power on arbitrators to determine jurisdiction "does not mean . . . that national courts will be

The court of appeals' statement that "once Article 8(3) of the Treaty is triggered, the Treaty's incorporation of the UNCITRAL Rules provides clear[] and unmistakabl[e] evidence . . . that the parties intended for the arbitrator to decide questions of arbitrability," Pet. App. 14a (citations omitted), is dicta. It is also not supported by the only case it cited in this regard, *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011), on which BG also relies. Pet. Br. 51. In *Chevron*, there was no dispute that there was a valid and binding agreement to arbitrate. 638 F.3d at 392-93.[19] It was only within that context of an undisputed agreement that the Second Circuit found that the UNCITRAL Rules were "clear and unmistakable" evidence that the parties agreed to refer to the arbitrators such issues as waiver and estoppel, neither of which go to the question of whether an agreement exists. *Id.* at 394-95; *cf. Howsam*, 537 U.S. at 85 ("time limits . . . [and] estoppel" are for arbitrators (emphasis and internal quotations omitted)).

The other case on which BG heavily relies, *Schneider v. Kingdom of Thailand*, 688 F.3d 68 (2d Cir. 2012), is likewise inapposite. In *Schneider*, the Second Circuit determined that the parties expressly adopted the UNCITRAL Rules in a post-dispute agreement, the

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deprived of power to make jurisdictional determinations when asked to stay litigation, enjoin arbitration, or vacate an award" (footnote omitted)).

[19] Under the BIT that was the subject of that case, quite differently from the Treaty here, the State parties require as a condition of their consent only that the investor provides "written consent" to the arbitration; because Chevron had done so, an agreement to arbitrate had been formed. *See Chevron*, 638 F.3d at 392.

Terms of Reference for the arbitration. *See id.* at 70. The court's acceptance of the UNCITRAL Rules as "clear and unmistakable evidence" arose only within that context of an uncontested agreement between the parties. *Id.* at 72. This case is not *Schneider*, nor is it *Chevron*.[20]

Rather, this case aligns with the Second Circuit's recent position in *VRG Linhas Aereas S.A. v. MatlinPatterson Global Opportunities Partners II L.P.*, No. 12-593-cv, 2013 WL 2372289 (2d Cir. June 3, 2013), a case BG overlooks. In contrast to *Chevron*'s reliance on the UNCITRAL Rules in circumstances in which the existence of an agreement was uncontested, the court in *VRG* pointedly cautioned that "[t]he more basic issue, however, of *whether the parties agreed to arbitrate in the first place is one only a court can answer*, since in the absence of any arbitration agreement at all, 'questions of arbitrability' could hardly have been clearly and unmistakably given over

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[20] The additional cases BG and its amicus USCIB cite in footnotes are largely inapposite. *See* Pet. Br. 49 n.14; USCIB Amicus Br. 13 nn.13-15. Only two of the cases concern the existence of an agreement to arbitrate, *Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989), and *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205 (2d Cir. 2005), and they are readily distinguishable in that they concern the continuing validity of a contract which contains an arbitration clause, not whether there was a valid and binding arbitration agreement at all. *See also* William W. Park, *The Arbitrability Dicta in* First Options v. Kaplan*: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?*, 12 Arb. Int'l 137, 146-47 (1996) ("Park, *Arbitrability Dicta*") (criticizing *Apollo* for "abdicating responsibility for determining the jurisdictional limits of arbitration clauses").

to an arbitrator." 2013 WL 2372286, at *3 n.2 (emphasis added).

This is the only reasonable approach. As noted by the Third Circuit in *China Minmetals*, "incorporation of [a rule providing that arbitrators can decide their jurisdiction] into the contract is relevant only if the parties actually agreed to its incorporation." 334 F.3d at 288; *see also, e.g.*, *Granite Rock*, 130 S. Ct. at 2862 ("[T]he CBA provision requiring arbitration of disputes 'arising under' the CBA is not fairly read to include a dispute about when the CBA came into existence."); Park, *Arbitrability Dicta*, 12 Arb. Int'l at 146 ("In many cases such a principle will assume the very proposition (arbitral jurisdiction) that remains to be proven.").

Indeed, this is the position adopted by the current draft Restatement. In addition to providing for de novo judicial determination of whether the parties have agreed to arbitrate, *supra*, at 23-24, it provides that reference to or adoption of rules conferring power on arbitrators to decide their own jurisdiction does not overcome this rule, *see* Restatement (Third) of the U.S. Law of Int'l Commercial Arbitration § 4-12(d) (incorporating by reference § 4-14, cmt. e, which rejects the argument for displacement of judicial review by the incorporation of arbitral rules authorizing arbitrators to decide jurisdiction).

The argument by BG and its amici is thus a tautology that tells only half the story – that because the UNCITRAL Rules authorize the arbitrators to determine their own jurisdiction, the arbitrators may determine their own jurisdiction. An agreement to use the UNCITRAL Rules to provide the procedure for an arbitration in which consent to arbitrate is disputed

does not and cannot answer the legally and logically anterior question of whether consent has been given in the first place. That question must ultimately be determined by a court.[21]

B. Remand Is Neither Necessary Nor Appropriate, and This Court Should Instead Affirm the Court of Appeals.

BG concedes that courts conduct de novo review when the existence of an agreement to arbitrate is in dispute. Pet. Br. 18. Because the court of appeals properly concluded that this is such a case, it should be affirmed. The United States likewise agrees that courts should conduct de novo review when the issue is consent under an investment treaty, U.S. Br. 15, but suggests that the case be remanded for the court of appeals to conduct further analysis of the Treaty to determine that issue, U.S. Br. 31. But the United States' brief suggests no reason why the court of appeals' determination of the issue was incorrect. And for good reason – the court of appeals appropriately analyzed the terms of the Treaty and concluded that the local recourse requirement is a condition of Argentina's consent. Moreover, the court's analysis

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[21] Under United States law, as under the law of other countries, the parties' agreement that an arbitral award will be "final and binding" does not preclude judicial review. *See Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145 (2d Cir. 1992); *M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 847 (6th Cir. 1996). BG therefore is not helped by the Treaty's use of that language, *see, e.g.*, Pet. Br. 26, 27, 52-53 (referencing Treaty, art. 8(4) ("The arbitration decision shall be final and binding on both Parties.")); Professors & Practitioners Amicus Br. 15, an argument BG never raised below.

demonstrates that its judgment would be the same even under a deferential standard of review. Its judgment should be affirmed.[22]

1. The Court of Appeals Correctly Analyzed the Treaty in Concluding That the Local Recourse Requirement Is a Condition of the State Parties' Consent.

The court of appeals acknowledged that it was rendering its decision in the context of "an international investment treaty between two sovereigns," Pet. App. 17a, and in that context, performed a proper analysis of the relevant Treaty provisions.

Under the Vienna Convention, the starting and in most cases the ending point of analysis is the terms of the treaty itself. *See* Vienna Convention, art. 31. This reflects the position under general international law, as described by the International Court of Justice: "If the relevant words in their natural and ordinary meaning

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[22] Thus, even if "[t]he courts below did not expressly invoke" the standard adopted by this Court, "remand would serve no purpose." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 733 (2013); *see also John Wiley*, 376 U.S. at 544 (affirming "on grounds which may differ from those of the Court of Appeals, whose answer to [the] question [of whether a corporate successor is bound to arbitrate under a collective bargaining agreement] is unclear").

Argentina preserved its challenge to the district court's conclusion that the ultimate power to determine the issue was conferred on the arbitrators, contrary to BG's claim. *See* Pet. Br. 60. BG is also mistaken that affirmance would allow it to raise new issues before the court of appeals. *See id.* 25 n.9. The court of appeals vacated the award. If this Court affirms, that will be the end of the matter.

make sense in their context, that is an end of the matter . . . ." *Competence of the Gen. Assemb. for the Admission of a State to the United Nations, Advisory Op.*, 1950 I.C.J. 5, 8 (Mar. 3). The same is true under United States domestic law, which consistently holds that "[t]he clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 181 (1982) (internal citation omitted).

The court of appeals not only "identif[ied]," Pet. Br. 24, but applied the Vienna Convention's "'[g]eneral rule of interpretation'" that "'[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,'" Pet App. 7a n.1 (quoting Vienna Convention, art. 31). BG laments the court of appeals' finding that it is "dispositive that the Treaty 'is explicit' in requiring eighteen months of litigation before arbitration." Pet. Br. 24. But under the terms of the Vienna Convention – not to mention ordinary rules for interpreting any contract – when a treaty provision is clear and does not lead to an "absurd or unreasonable" result, Vienna Convention, art. 32(b), no further analysis is required.

BG's claim that the court of appeals failed to consider in its Treaty analysis, among other issues, "whether Argentina's emergency measures altered the result" is factually inaccurate. Pet. Br. 24. Rather, the court of appeals took that claim into account but rejected it and, in particular, that delay would undermine the speed and efficiency expected of

arbitration and frustrate the parties' intentions: "The Treaty explicitly *requires* judicial proceedings prior to arbitration. That is, the contracting parties [*i.e.*, Argentina and the United Kingdom] specifically desired 'the delay attendant upon judicial proceedings preliminary to arbitration.'" Pet. App. 17a (quoting *John Wiley*, 376 U.S. at 558). The court stressed that "a court cannot lose sight of the principle that led to a policy in favor of arbitral resolution of international trade disputes: enforcing the intent of the parties." *Id.* 19a.

If there was any failure to consider "BG's alternative bases for the tribunal's jurisdiction," Pet Br. 24, it is because BG did not present any such arguments to the court of appeals.[23] The court cannot be faulted for not considering an argument of which BG thought so little that it did not raise it. *See United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001) (declining to entertain an argument set forth by petitioner "when those arguments were not pressed in the court whose opinion we are reviewing"); *Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." (internal citations omitted)).

More fundamentally, none of these arguments is tied to the Vienna Convention itself or concern any of

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[23] BG did not present an argument based on the MFN clause or on supposed delay in the court of appeals, *see* BG D.C. Cir. Br. 10-17, and only mentioned those matters in the district court in describing the tribunal's decision, not as grounds for the district court's ruling, *see* Mem. of P. & A. 18-19.

the means of construction provided in Article 31. While Article 32 allows resort to supplemental materials if the text is ambiguous or would lead to an "absurd" result, those supplemental materials are things like "the preparatory work of the treaty and the circumstances of its conclusion." Vienna Convention, art. 32. BG makes, and made, no reference to any preparatory works of the Treaty or circumstances of the conclusion of the Treaty in advocating a different interpretation, nor – importantly – did the tribunal itself rely on these sources. *See* Pet. App. 161a-171a. Moreover, no resort to supplemental materials was needed in this case, as the Treaty is clear on its face in requiring recourse to local courts.

The court of appeals was correct, in any event, in not crediting the arguments BG made to the tribunal or the tribunal's own reasoning for disregarding the clear requirement of Argentina and the United Kingdom that their respective courts would have the opportunity to resolve disputes before being brought to arbitration. International law provides that "jurisdiction is based on the consent of the parties and is confined to the extent accepted by them." *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction of the Court and Admissibility of Application, 2006 I.C.J. 6, 39 (Feb. 3); *see also, e.g.*, *Fisheries Jurisdiction Case (Spain v. Canada)*, Jurisdiction of the Court, Judgment, 1998 I.C.J. 432, 453 (Dec. 4) ("Conditions or reservations thus do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court." (internal citations omitted)).

The contracting States' purpose – to afford their own tribunals the opportunity to resolve disputes – is not undermined in the least by the arguments on which BG and the tribunal relied. The Treaty requires such recourse, and there is no basis to find futility and thus nothing "absurd" here. Before the arbitral tribunal, BG argued that it was unlikely to obtain a final decision in the Argentine courts in less than six years, which in its view rendered the requirement to pursue such recourse for eighteen months "senseless." Pet. App. 6a, 163a. But futility "requires more than one side simply proffering its best estimate or prediction as to its likely prospects of success, if available recourse had been pursued," but instead requires an absolute bar to recourse. *Apotex Inc. v. United States*, Award on Jurisdiction and Admissibility, ¶ 284 (June 14, 2013); *cf. Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013) ("[T]he fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy."). BG's argument therefore does not establish "futility" and should be readily rejected – as, indeed, the tribunal itself did, *see* Pet. App. 165a, and the court of appeals noted, *see id.* 6a (noting the tribunal's "reject[ion of] BG Group's arguments").

Nor does BG fare any better under the rationale of the tribunal, which the court of appeals correctly noted was adopted sua sponte. Pet. App. 17a-18a. The tribunal's argument that recourse to Argentine courts would be "absurd and unreasonable" was based on a hypothetical scenario in which the Argentine executive might intervene in a hypothetical litigation BG might have brought so as to negate its results. *Id.* 165a-171a. But this argument is no different in kind and no less

misconceived than the one the tribunal properly rejected; it amounts to a prediction about the possibility that BG might not be successful but by no means establishes that a judicial avenue was not available at the time BG brought its claim to arbitration. Moreover, as discussed *supra*, at 6-7, and as the court of appeals observed, Pet. App. 17a, the provisions to which the tribunal referred had no impact on BG's access to local courts.

While the United Kingdom and Argentina must have been aware of the possibility that some investors wishing to make a legal claim against the host State under the Treaty might claim that domestic remedies would be "futile," they still required resort to those remedies. The Treaty expressly foresees, and requires local recourse in, the very situation that BG argues would make its application futile or absurd by contemplating that the dispute may remain after a final disposition in the local courts or after eighteen months, whichever comes sooner, and, if so, allowing the investor to invoke arbitration. There is nothing absurd, unreasonable, nor futile in requiring the investor to comply with the terms of the Treaty in that event, and the court of appeals correctly so held.[24]

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[24] Thus, as was the case in *Dallah*:

> The tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all. This is so . . . whatever the composition of the tribunal – a comment made in view of Dallah's repeated (but no more attractive for that) submission that weight should be given to the tribunal's 'eminence', 'high standing and great experience'.

2. The Court of Appeals' Decision Properly Would Vacate the Award Even Under a Highly Deferential Standard of Review.

Even if the litigation requirement contained in Article 8 of the Treaty constitutes a mere "procedural precondition[]" as BG incorrectly contends, Pet. Br. 41, the award still cannot stand. Under the FAA, an award made under the primary jurisdiction of the United States may be vacated even under a more deferential standard "where the arbitrators exceeded their powers" in making that award. 9 U.S.C. § 10(a)(4).

Deferential review does not mean no review at all, but no review is what the district court performed when it erroneously concluded that "it must" "[a]ccept[] . . . the arbitral panel's construction of the Investment Treaty." *See* Pet. App. 43a. On appeal, BG's argument in support of the district court was that "[b]ecause the Tribunal was, at the very least, 'arguably construing or applying the contract, a court must defer to the arbitrator's judgment.'" BG D.C. Cir. Br. 17 (internal citations omitted). But even applying that minimal standard, the court of appeals correctly concluded that annulment was required as a matter of law:

> Where, as here, the result of the arbitral award was to ignore the terms of the Treaty and shift the risk that the Argentine courts might not resolve BG Group's claim within eighteen months pursuant to Article 8(2) of the Treaty,

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Dallah [2010] UKSC 46, [30]; *cf.* Pet. Br. 25-26, 39 (adverting to credentials of arbitrators).

> the arbitral panel rendered a decision wholly based on outside legal sources and without regard to the contracting parties' agreement establishing a precondition to arbitration.

Pet. App. 2a.[25]

In short, by giving priority to investors' supposed "entitle[ment] to seek enforcement of their treaty rights" through arbitration, *id.* 165a, over the requirement in the Treaty that such disputes "shall be submitted" to local tribunals, *id.* 3a, and by falsely portraying the local recourse requirement as "an absolute impediment to arbitration," *id.* 165a, "the arbitration panel imposed its own policy choice and thus exceeded its powers," *see Stolt-Nielsen*, 130 S. Ct. at 1770. Accordingly, even under an "exceedingly narrow" standard, Pet. App. 2a, the court of appeals correctly "'conclude[d] that there can be only one possible outcome on the [arbitrability question] before us,' namely, that BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration," Pet. App. 19a-20a (quoting *Stolt-Nielsen*, 130 S. Ct. at 1770), and in that circumstance correctly vacated the award.

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[25] BG's amici erroneously criticize the court of appeals as having labeled the Vienna Convention as "outside legal sources," Professors & Practitioners Amicus Br. 22, but that was not the court's referent. Rather, the court was speaking to the Emergency Law provisions on which the tribunal relied to "shift the risk that the Argentine courts might not resolve BG Group's claim within eighteen months." Pet. App. 2a.

3. Strong Policy Reasons of Respect for Sovereignty, As Well As Accountability, Argue Against the Dilution of Judicial Review that BG and Its Amici Advocate.

BG and its amici would have the Court believe that judicial control in the context of investor-State arbitration is less important than in the commercial context, arguing for example that the objectives of the Treaty "would be undermined if the Treaty were read to allow the domestic courts of a third state (whose identity will vary from case to case) to review the arbitral tribunal's decisions *de novo*," Pet. Br. 55; *see also* USCIB Amicus Br. 15.[26] The opposite is the case.

BG's argument disregards the allocation of competence between primary and secondary jurisdictions – and, relatedly, between courts and arbitrators – under the New York Convention, which is the well-established background against which arbitration, including treaty arbitration, has taken place for decades. Considering that this case involves a treaty of the United Kingdom, it is particularly relevant that the English Court of Appeal in *Occidental* rejected the proposition that the standard of review should be diluted in a BIT case. As the *Occidental* court concluded, and contrary to BG's argument, *see*

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[26] More than two decades ago Professor Reisman cautioned courts against the "abdication of responsibility for providing some system of control over international commercial arbitration" prompted by "pressure from small segments of the bar anxious to attract more arbitral business," "asking [for] the privilege of resolving disputes without any control over anything that may be done," and who portray their narrow view as "the interests of the polity as a whole." Reisman, *supra*, at 132.

Pet. Br. 43, inasmuch as the State parties provided for arbitration, they must necessarily have expected to have the benefit of ordinary judicial oversight of the arbitral process, *see* [2005] EWCA Civ. 1116, [47]. It defies credibility to believe that Argentina and the United Kingdom – which between them have concluded dozens of BITs and are both signatories to the Convention, Pet. Br. 6 n.1 – were not aware of just this possibility.

A court's claim of power to bind a sovereign State to arbitration is no less dependent on consent, and no less momentous, than the power to displace courts in favor of commercial arbitration. The exercise of such power also implicates comity concerns, *see* U.S. Br. 22; Pet. App. 19a, which militate against diluting standards for judicial supervision, particularly in the context of investor-State arbitration, where the parties to the agreement at issue are sovereign States, signatories to a treaty. As the United States' brief highlights, "[w]hen present, conditions on the formation of an arbitration agreement – like limitations on a waiver of sovereign immunity to a suit in court – can serve important sovereign functions by limiting the terms under which the sovereign State may be subject to such proceedings against it." U.S. Br. 21. In a case under an investment treaty, no less than in private commercial arbitration, a court should satisfy itself that the parties had a valid and binding agreement to arbitrate.

Investment treaty arbitration, unlike commercial arbitration, implicates important public interests: investor-State disputes usually concern the exercise of State power, which exercise arrives with a presumption

of regularity and having been undertaken for the public good. An adverse award in the investment treaty context has public ramifications that are not present in the commercial context, given the award's potential to undermine significant regulatory measures and the fact that the award requires payment from the national treasury. It could also cause the host State and other States to adopt an unnecessarily cautious approach in the future to the formulation of public policies to avoid the burden, expense, and uncertainty of future treaty claims. Public accountability and legitimacy demand that conditions to a contracting State's consent to arbitrate be reviewed with *at least* as much care as questions of consent in a private commercial context.[27]

BG adds no credit to its position by starting its argument with ad hominem attacks on Argentina based on matters outside the record and unrelated to the question presented here. *See* Pet. Br. 28-31. This case is not a referendum on Argentina's conduct in the face of an historic economic collapse or in legal proceedings that followed. *See* U.S. Br. 5 n.1. The conduct at issue is BG's deliberate decision to ignore the terms of Argentina's consent to arbitrate, and its attempt to bind Argentina to an award rendered without jurisdiction. As to that issue, "there can be

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[27] *See generally, e.g.*, William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Sphere: The Standard of Review in Investor-State Arbitrations*, 35 Yale J. Int'l L. 283 (2010); *cf.* Park, *Arbitrability Dicta*, 12 Arb. Int'l at 147 (deference to arbitrators instead of appropriate judicial review could cause "a loss of confidence by the business community in both the arbitral system and the judiciary that enforces arbitration agreements and awards").

only one possible outcome," Pet. App. 19a, which is to uphold the decision to vacate the award.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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BG GROUP PLC,

Petitioner,

v.

REPUBLIC OF ARGENTINA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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REPLY BRIEF FOR THE PETITIONER

This case presents a familiar pattern for the Court. The court of appeals' ruling is indefensible. So the respondent has advanced an alternative ground for deciding the case in its favor that is not encompassed by the Question Presented and was not pressed in or passed upon by the court of appeals. Even if this Court were to decide that argument, it lacks merit.

The D.C. Circuit obviously erred in holding that courts rather than arbitrators presumptively determine compliance with preconditions to arbitration. *See* Part I.A, *infra*. Argentina has waived its newfound argument that the eighteen-month litigation provision (Local Litigation Provision) of the U.K.-Argentina bilateral investment treaty (Treaty)[1] is a condition on the existence of the parties' arbitration agreement, not a precondition to commencement of arbitration. *See* Part I.B, *infra*.

Argentina's new argument also fails for two independent reasons: it is wrong and it is irrelevant. The Local Litigation Provision is indistinguishable from the measures that this Court has determined are procedural preconditions to arbitration. *See* Part II.A, *infra*. In any event, no matter how the provision is characterized, the parties intended that the expert

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[1] Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, Arg.-U.K., Dec. 11, 1990, 1765 U.N.T.S. 33, App. 1a-15a.

arbitral tribunal, not a U.S. court, would determine its application. *See* Part II.B, *infra*.

I. The Court Should Resolve This Case By Reversing The D.C. Circuit's Holding That Courts Do Not Defer To Arbitrators' Determination Of Jurisdictional Disputes Over Preconditions To Arbitration.

A. Petitioner's opening brief and the briefs of its supporting *amici* establish that the D.C. Circuit's holding that courts presumptively decide disputes over the application of preconditions to arbitration cannot be reconciled with this Court's decisions in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002), and *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964). *See* Pet. Br. Part I; AAA Br. 8-9; USCIB Br. 4-6; Professors and Practitioners Supporting Pet. Br. 25-28. In *Howsam*, in particular, the Court emphasized that "conditions precedent to an obligation to arbitrate . . . are for the arbitrators to decide." 537 U.S. at 85. By contrast, there are only "narrow circumstance[s] where contracting parties would likely have expected a court to have decided [a] gateway matter." *Id.* at 83.

Famous for refusing to abide by adverse rulings of U.S. courts, *see* Pet. Br. 28-30, Argentina has now abandoned the rationale of the D.C. Circuit's ruling in its favor. Argentina does weakly attempt to recharacterize the ruling below, asserting that the D.C. Circuit actually held that compliance with the Local Litigation Provision is a prerequisite to the existence of an arbitration agreement. Resp. Br. 14-15. In fact, the court of appeals reasoned that "Article 8(2) sets the conditions by which such a dispute may be submitted to international

arbitration." Pet. App. 3a. The D.C. Circuit then held that a court, rather than an arbitrator, determines whether a party has complied with such "a precondition to arbitration." *Id.* 15a. The court of appeals distinguished this Court's decisions in *Howsam* and *John Wiley* on the ground that they were essentially limited to their facts, rather than on the ground – now urged by Argentina – that those cases involved existing arbitration agreements. *Id.* 16a-18a, 18a n.6.

Argentina unsuccessfully urged the same revisionist reading of the D.C. Circuit's decision at the certiorari stage as the basis for this Court to deny review. *Compare* BIO 1 *with* Cert. Reply 2-3. Argentina now argues that the D.C. Circuit "decided for itself whether the antecedent legal question – 'who decides arbitrability' – was for the arbitrators or the courts." Resp. Br. 14 (quoting Pet. App. 15a). But Argentina takes those three words from the decision ("who decides arbitrability") out of context. The court actually said:

> Because the Treaty provides that a precondition to arbitration of an investor's claim is an initial resort to a contracting party's court, and the Treaty is silent on who decides arbitrability when that precondition is disregarded, we hold that the question of arbitrability is an independent question of law for the court to decide.

Pet. App. 15a.

Because the D.C. Circuit held that courts rather than arbitrators presumptively determine compliance with a "precondition to arbitration," *id.*, and that holding squarely conflicts with this Court's

precedents, the court of appeals' judgment should be reversed. That conclusion resolves this case.

B. Argentina principally argues that the judgment should be affirmed on the alternative ground that the Local Litigation Provision is a precondition to the existence of an arbitration agreement between the parties. Resp. Br. 31-32. Argentina, however, offers no reason for this Court to depart from its settled practice of not deciding issues not fairly encompassed by the Question Presented, particularly when they were not presented or decided below.

Argentina's new argument was neither "pressed in" nor "passed upon by" the court of appeals, a condition intended to ensure that this Court does not decide difficult questions in the first instance. *See Glover v. United States*, 531 U.S. 198, 205 (2001) (declining to consider the United States's "various arguments for alternative grounds to affirm the Court of Appeals" because "they were neither raised in nor passed upon by the Court of Appeals. In the ordinary course we do not decide questions neither raised nor resolved below. As a general rule, furthermore, we do not decide issues outside the questions presented by the petition for certiorari." (citing *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992))). Instead, this Court "would apparently be the first court in the Nation to determine" whether a condition to arbitration in an investment treaty determines the existence of an arbitration agreement. *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992).

Indeed, this would be the least appropriate circumstance for this Court to decide such an argument, because Argentina affirmatively asked the

D.C. Circuit to treat the Local Litigation Provision as a precondition to arbitration. *See, e.g.*, Resp. C.A. Reply Br. 4 ("The award . . . has simply failed to enforce the terms of the arbitration agreement that required as a condition precedent to arbitration prior recourse to the local courts."); *see also, e.g.*, *id.* at 5; Resp. C.A. Br. 17.

Argentina did argue below that it had not "consented" to arbitration. But that argument did not preserve the distinct claim that satisfaction of the Local Litigation Provision is a matter of substantive, rather than procedural, arbitrability. This Court has previously observed that, "[l]inguistically speaking," virtually any procedural objection can be characterized as a condition on a party's consent to arbitrate. *Howsam*, 537 U.S. at 83. The defendant in *Howsam*, for example, could rightly have claimed that it did not consent to dispute claims made outside the limitations period. Likewise, the employer in *John Wiley* could have insisted that it did not consent to arbitrate complaints that had not been through the union grievance system.

More fundamentally, Argentina did not challenge the arbitrators' jurisdiction to decide the arbitrability of the parties' dispute. Argentina submitted its jurisdictional claim to the tribunal. Then, in its federal court challenge to the award, Argentina contested the merits of the tribunal's jurisdictional ruling but did not dispute the arbitral tribunal's power to determine its own jurisdiction. Instead, Argentina accepted that an arbitration agreement existed; acknowledged that "an arbitral decision may be set aside only in the 'narrow circumstances' foreseen in Section 10" of the FAA, Resp. C.A. Br. 21

n.11; and argued that the tribunal's award fell within those narrow circumstances because the "Arbitrators exceeded their authority by disregarding the terms of the parties' agreement," Petition to Vacate or Modify Arbit. Award (Vacatur Petition) at 3 ¶ 41, No. 08-cv-485-RBW (D.D.C. Mar. 21, 2008), ECF No. 1; *see* 9 U.S.C. § 10(a)(4) (authorizing vacatur "where the arbitrators exceeded their powers"). *See, e.g.*, Resp. C.A. Reply Br. 4-5 ("The *terms of the arbitration agreement between Argentina and BG* included an obligation to submit any dispute to local courts for 18 months before the parties can bring their claims to arbitration. . . . The Tribunal disregarded the intentions of the parties in this regard, and the terms of the Arbitration Agreement." (emphasis added)).

II. Even If The Court Goes Beyond The Question Presented To Address Argentina's New Theory, The Judgment Must Be Reversed.

Were the Court to elect to go beyond the Question Presented and the arguments raised and decided below, it should nevertheless conclude that the Local Litigation Provision is a procedural "precondition to arbitration" presumptively addressed by arbitrators. In any event, Argentina's effort to affix a different label to the provision is irrelevant. The parties intended and understood that the arbitral tribunal, not a court, would determine the provision's effect, such that the tribunal's ruling would be subject to deferential review under the FAA.

A. The Local Litigation Provision Is A Procedural Precondition To Arbitration.

1. In Article 8 of the Treaty, Argentina guarantees qualifying U.K. investors that their claims will be resolved by arbitration, subject to the precondition that those claims will first be submitted to the Argentine courts for up to eighteen months before arbitration commences. Treaty art. 8, App. 9a-11a. The question in this case is who decides whether Argentina's conduct deprived it of the right to invoke the Local Litigation Provision. The better view is that the arbitrators have that authority, and that the Local Litigation Provision (when it applies) is a precondition to the arbitrators' decision of the merits of the investor's claim, not to their jurisdiction over the case. The Treaty thus specifies that the tribunal shall "decide the dispute," and that its "decision shall be final and binding on the parties." *Id.* art. 8(4), App. 10a.

By contrast, the Treaty does not contemplate that any other forum could decide that (or any other) question arising under the Treaty. The only possible alternative forum would be the local Argentine courts, which the Treaty specifies cannot issue a decision that binds the investor. *Id.* art. 8(2)(a)(ii), App. 9a. Argentina's counter-argument seems to rest on the assumption that the Local Litigation Provision should be read in isolation, perhaps because it appears prior to the specification of the arbitrators' authority. But Article 8 as a whole makes clear that the only final decision maker for Treaty disputes is the arbitral tribunal.

Through the Treaty, Argentina thus provided BG a standing offer to have any Treaty disputes resolved

by arbitration, an offer BG accepted by submitting its notice of claim. Resp. Br. 31; *see Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 392 (2d Cir. 2011) (the difference between BIT awards and other commercial arbitration awards "proves to be a distinction without a difference, since [the state], by signing the BIT, and [the investor], by consenting to arbitration, have created a separate binding agreement to arbitrate"). The option having been exercised, BG then elected not to comply with the Local Litigation Provision because (*inter alia*) it considered Argentina to have forfeited its right to rely on that provision given its decision to punish investors that pursued local litigation. Pet. App. 165a-71a. The parties then disputed whether BG was correct or whether it was instead required to comply with the precondition. The arbitral tribunal was the body with authority to decide that issue.

2. Argentina cannot seriously contest that the Local Litigation Provision is indistinguishable from the time limits and the staged grievance procedure that this Court has squarely held raise questions of "procedural arbitrability" that are presumptively decided by arbitrators, rather than the courts. *See Howsam*, 537 U.S. at 85; *John Wiley*, 376 U.S. at 557. Argentina's only response is that in those cases the parties had entered into an arbitration agreement, whereas it maintains here that its "consent" to arbitrate was contingent on satisfaction of the Local Litigation Provision. Resp. Br. 17. But that is nothing more than an attempt to reargue *Howsam* and *John Wiley*. In *Howsam*, the precondition provided that no dispute "shall be eligible for submission to arbitration . . . where six (6) years have elapsed from the occurrence or event giving rise to

the . . . dispute." 537 U.S. at 81. The party opposing arbitration argued that any assertion that an arbitration agreement existed was "*ipse dixit* [that] simply begs the question whether the parties consented to arbitrate certain (as here, stale) disputes. That question turns on the parties' expressed intent, which is embodied in the" timeliness rule. Brief for Respondent, *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (No. 01-008), 2002 WL 1728503, at *15 & n.1. In *John Wiley*, the agreement provided that arbitration was permissible only "in the event that the grievance shall not have been resolved or settled" by other procedures. 376 U.S. at 556. In both cases, this Court rejected the argument that the conditions went to the existence of an agreement to arbitrate the particular dispute. *Howsam*, 537 U.S. at 85; *John Wiley*, 376 U.S. at 557.

3. The fact that there is no distinction between Argentina's "consent" theory and the arguments rejected in *Howsam* and *John Wiley* establishes that Argentina's actual argument is that those precedents simply do not apply in the context of arbitration agreements formed by exchange of instruments of consent, such as BG's acceptance of the Treaty's standing offer to arbitrate. On Argentina's view, *every* precondition to arbitration in such circumstances implicates the formation of an arbitration agreement. Argentina thus contends that BG's explicit and unequivocal acceptance of Argentina's offer to arbitrate in the Treaty was actually a "counter-offer, which Argentina rejected." Resp. Br. 16.

That argument lacks merit. First, Argentina's position is counterfactual as there was nothing in BG's notice of consent that expressed a rejection of any aspect of Argentina's arbitration offer. Second, there is no textual support for Argentina's position that compliance with the Local Litigation Provision is necessary before BG could consent to arbitration with Argentina under the Treaty. At most, there is an ambiguity: is the Local Litigation Provision a prerequisite to the investor's right to exercise the option or simply a prerequisite to the commencement of the arbitration proceedings? Under the Vienna Convention on the Law of Treaties, any such ambiguity must be resolved in a manner consistent with the Treaty's "object and purpose."[2] That object and purpose is expressed in the Treaty's preamble, which states that the purpose of the Treaty is to "create favourable conditions for greater investment" and that the "protection under international agreement of such investments will be conducive" to that end. Treaty recitals, App. 1a.

Parties plainly may agree to procedural preconditions to the commencement of arbitration (as in *John Wiley*) or limitations periods (as in *Howsam*). For example, offers for the sale of consumer goods (such as computer software) may specify that the purchaser agrees to arbitrate any resulting dispute. Those provisions may require some prior procedural step, such as nonbinding conciliation. But there is no serious argument that if the purchaser declines to

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[2] Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

engage in conciliation, no arbitration agreement exists and the purchaser can file suit in court. Yet that is the inevitable consequence of Argentina's position.

There is a logical dividing line in the context of such agreements between a substantive condition on the creation of an arbitration agreement (presumptively decided by the courts) and a procedural precondition to commencement of the arbitration (presumptively decided by the arbitrators). The relevant question is whether, if the condition failed, the dispute instead would be resolved in court. In other words, does the condition determine whether the parties "consented to arbitration" *rather than* the default civil apparatus for deciding their dispute? If the alternative would be litigation in court, then permitting the arbitrators to determine compliance with the condition would assume their authority to decide the case. But if the parties contemplated no other decision maker for their dispute, they have accepted the arbitrators' authority to decide whether the condition must be satisfied.

Here, it is undisputed that once the arbitration option is exercised, *only* the arbitrators are empowered to decide whether a qualifying investor has exercised its option to arbitrate under the Treaty. There is no other decision maker. The only theoretical alternative is the local Argentine courts. But the Treaty provides that the outcome of the local litigation cannot have *any* effect on the complaining party's right to an arbitral ruling. Absolutely nothing that occurred in the Argentine courts could have any effect on BG's right to submit its claim to

binding arbitration; no matter what the local courts ruled, BG would have the unqualified right to an arbitral decision. As Argentina concedes, "[t]he Treaty does not require exhaustion of local remedies." Resp. Br. 3. Indeed, the most that Argentina can say is that a decision of a local court – in the event it even made one within the eighteen-month period – "could inform the terms of the arbitration." *Id.* 33. It is unclear what the arbitrators would learn from such a ruling, given that the local courts have no particular experience with or expertise in interpreting the Treaty. But in any event, a requirement "that local courts be afforded the *first* say in a dispute, before an arbitration may be commenced," *id.*, is the very definition of a procedural step prior to the commencement of the arbitration, not a condition on Argentina's agreement that the arbitrators would be the decision makers.

That in this case the parties' arbitration agreement was in effect is easily illustrated. Imagine that after filing a notice of claim under the Treaty, BG had sued Argentina in federal district court in the United States. Argentina plainly would have the right to compel arbitration under the FAA, based on the fact that the parties had agreed to arbitrate their disputes. *See* 9 U.S.C. § 4. In such a case, BG could not have defended against that motion on the ground that no arbitration agreement existed because it had not submitted its dispute to the Argentine courts. Instead, Argentina would have had the right to move in the arbitration to dismiss the claim for failure to satisfy the Local Litigation Provision, just as it did in this case.

The consequences of Argentina's contrary reading are implausible. Imagine that Argentina adopted an emergency decree – similar to the one in this case – indefinitely staying all local proceedings on investors' claims, and the national courts issued a ruling interpreting the period of required litigation under the Treaty to extend until the conclusion of the stay. Or imagine that Argentina issued a decree requiring an investor to post an impossibly high bond before submitting its claim to the local courts. In both instances, according to Argentina, its national courts would have the power, by enforcing those provisions, to prevent access to arbitration because no arbitration agreement could be formed absent local litigation, and the arbitral tribunal would be powerless to rule otherwise.

B. Even If The Local Litigation Provision Raises A Question Of "Substantive Arbitrability," Any Presumption That A U.S. Court Would Decide Its Application Is Overcome.

Argentina hopes that by relabeling the Local Litigation Provision as raising a question of "substantive arbitrability" it can rely on the presumption that courts determine the existence of an arbitration agreement. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). That presumption is, however, rebuttable – and it is rebutted in this case by the background understanding of treaty arbitration, the terms of this specific Treaty, and the parties' conduct.

Argentina and the U.K. entered into the Treaty against the backdrop of a settled expectation that disputes about arbitrators' jurisdiction – including

disputes about the existence of an enforceable arbitration agreement – will be submitted to, and resolved by, arbitrators. Argentina proves the point by citing the rulings of several arbitral tribunals on whether an investor must comply with a local litigation provision. *See* Resp. Br. 35 n.15. Indeed, no other national court has, to BG's knowledge, ever decided this question de novo in the history of investment-treaty arbitration.[3]

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[3] Argentina's insistence that it is settled that international practice "favors some form of judicial review" of arbitral rulings on threshold jurisdictional questions, Resp. Br. 24 (quotation omitted), is misguided. The FAA does provide for judicial review of arbitral rulings. But this Court has consistently enforced Congress's determination that those rulings shall be accorded deference in order not to discourage efficient resort to arbitration.

Argentina further errs in cherry picking examples from courts in some other jurisdictions to claim that there is a "consistent State practice" of reviewing any arbitral ruling on jurisdiction. Resp. Br. 26 n.7. It omits that if this arbitration happened to be conducted under the ICSID procedures, which the Treaty also contemplates, judicial review of the tribunal's jurisdictional ruling would be forbidden in all of those jurisdictions. U.S. Br. 3, 18. But even outside the ICSID context, as the United States acknowledges, U.S. Br. 24, there is no international consensus on this question. The reason is simple: "[e]ach primary jurisdiction may decide for itself the grounds on which to vacate awards, and under what standard of review," Resp. Br. 8, and nations differ in their approach to review of arbitral awards.

Argentina does not identify any other jurisdiction that (consistent with this Court's interpretation of the FAA in *Howsam*) distinguishes between issues of substantive and procedural arbitrability, yet would determine de novo whether BG was required to comply with the Local Litigation Provision.

The doctrine of competence-competence embodies the understanding that arbitral tribunals will determine their own jurisdiction, subject to the principles of judicial review established by domestic law governing arbitration awards. "States expect an arbitral tribunal – and if necessary, a reviewing court – to enforce conditions on a State's consent to form an investor-state agreement." U.S. Br. 21; *see* Pet. Br. 44-45; Resp. Br. 26-28.

That is no surprise. The parties to an investment-treaty arbitration (including the state party) are able to appoint to the arbitral tribunal arbitrators who are experts in the subject matter and law involved, as well as the sovereignty issues

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So the foreign decisions it cites provide no guidance here; following them would require overruling *Howsam* and deviating from the statute Congress enacted. Some nations would review the arbitral ruling in this case de novo because they reject the approach of the FAA altogether, including in domestic commercial cases; others, such as the United Kingdom, apply de novo review to all "jurisdictional" rulings, including those relating to procedural preconditions that under the FAA and *Howsam* are unquestionably within the tribunal's power to decide. *See, e.g.*, Arbitration Act, 1996, c. 23, § 67 (U.K.). Similarly, the Model UNCITRAL Law cited by Argentina is just that – a "model" – which some domestic courts have interpreted as imposing an entirely different standard of review on jurisdictional questions than the FAA. By contrast, key arbitration-friendly jurisdictions such as France would (as in *Howsam*) defer to arbitral rulings on procedural preconditions to arbitration. *See, e.g.*, Cour d'appel [CA] [regional court of appeal] Paris, 1e ch. C, Mar. 4, 2004, *Nihon Plast v. Takata-Petri*, Rev. Arb. 2005, 143 (holding that failure to comply with a precondition to arbitration in a multi-tiered dispute resolution clause was a matter for the arbitrators to decide finally).

routinely involved in the resolution of foreign-investment disputes. As the United States concedes:

> Deferential review is also appropriate in light of arbitrators' expertise in international law in general and the resolution of investor-state disputes in particular. Arbitrators' expertise typically extends to threshold objections to arbitration. Because the limitations on which such objections would be based are set forth in the investment treaty itself, objections to the tribunal's authority ordinarily involve treaty interpretation – as do the bulk of the merits-based disputes the tribunal must resolve.

U.S. Br. 27.

Indeed, BG's claim on the merits is entirely bound up with Argentina's jurisdictional objection. The arbitrators found that Argentina violated the principles of international law expressly incorporated into the Treaty by interfering with BG's access to relief if it commenced the litigation process. *See* Pet. App. 232a-42a.

The tribunal is accordingly the "decisionmaker with . . . comparative expertise" in resolving disputes between investors and states. *See Howsam*, 537 U.S. at 85. And that split of relative competence is a reason to grant arbitrators in investment treaty cases *more* deference than is afforded in the commercial context, not less – especially when it is recognized that the comparison ex ante is between an expert tribunal on the one hand and a court in an unknowable third country on the other. *See* Pet. Br. 55-56.

Further, an essential premise of an investment treaty is that foreign companies are unlikely to risk hundreds of millions of dollars in investments without access to the impartial forum of arbitration for the resolution of disputes. *See* Professors and Practitioners Supporting Pet. Br. 6-7. But allowing local courts to keep the gates to that impartial forum closed would dramatically undermine the investor confidence that the promise of neutral arbitration is intended to ensure. *See* Treaty recitals, App. 1a.

The course of the parties' conduct demonstrates that they understood that under the Treaty, the arbitral tribunal would resolve Argentina's invocation of the Local Litigation Provision. When BG submitted its claim, Argentina did not commence litigation of the dispute in Argentina (seeking, for example, declaratory relief), even though it had the right to do so under the Treaty. Pet. App. 162a-63a. Nor did Argentina seek to enjoin the arbitration in any other court – as would have been expected given its current position. Instead, Argentina accepted, in accordance with the terms of the Treaty, that the parties' dispute would be arbitrated under the UNCITRAL Rules established as the default rules under the Treaty. *See* Treaty art. 8(3), App. 9a-10a. In accordance with those rules, it negotiated a seat for the arbitration and participated in selecting arbitrators. Pet. Br. 56. And it submitted its jurisdictional objection to the arbitrators under the UNCITRAL rule that specifically gives the tribunal the power to decide jurisdictional objections. *Id.* 12, 57.

In subsequently seeking to have the award overturned in federal court under the FAA,

Argentina did not assert that the arbitral tribunal lacked jurisdiction to determine its own jurisdiction over the dispute. Instead, it acknowledged that "arbitral tribunals have the competence to determine their own competence." Rep. to Mem. of P. & A. at 10, No. 08-cv-485-RBW (D.D.C. Feb. 20, 2009), ECF No. 40.

Finally, this case does not implicate the twin rationales of *First Options* in adopting a presumption in favor of judicial determination of the narrow question of "*who* (primarily) should decide arbitrability." 514 U.S. at 944-45; *see* Pet. Br. 43–44. First, there is no risk of depriving Argentina of "a court's decision about the merits of its dispute," *First Options*, 514 U.S. at 942, because the Treaty reserves to the arbitral tribunal alone the right to issue a final and binding decision on the merits of investor-state disputes under the Treaty. Second, while the issue of who decides arbitrability may be "rather arcane" to those unfamiliar with international arbitration, neither Argentina nor the United Kingdom falls into that category. *See* Pet. Br. 44.

In sum, however the Local Litigation Provision is construed, the parties plainly agreed that the arbitrators would resolve the issue of compliance with it. Under this Court's precedents, therefore, the arbitrators' determination is entitled to deference.

III. There Is No Merit To The Proposal Of The United States That U.S. Courts Review De Novo All Objections To Arbitrability Raised By A State That Implicate "Consent" To Arbitration, Whether Or Not The Objection Is Procedural Or Substantive.

The United States has filed an *amicus* brief that – like Argentina's submission – effectively urges the Court to hold that its decisions in *Howsam* and *John Wiley* are inapplicable to this case. But whereas Argentina's argument would extend to all agreements formed by exchange of instruments, the Solicitor General's submission seeks a special rule for the cases involving state parties' jurisdictional objections to arbitration under a bilateral or multilateral investment treaty. U.S. Br. 19. According to the Solicitor General, every question of arbitrability that implicates the state party's "consent" to arbitrate – irrespective of whether the objection is procedural or substantive in nature – must be decided de novo. *Id.* 21-22.

Although not acknowledged by the government, the special rule it proposes for judicial review of a state party's jurisdictional objections has never been adopted by any U.S. court, or indeed (so far as can be determined) by any court in the world, and certainly not by any jurisdiction that serves as a frequent seat of arbitration. The rule is not only novel but entirely newfound, as the Solicitor General did not propose it in the government's invitation brief at the certiorari stage. The United States's (unstated) reason for urging this substantial departure from past precedent is obvious: it would exempt the United States from the Court's precedents in the many

instances in which it is a state "party to numerous investment treaties and free trade agreements incorporating investment chapters . . . , which typically provide for investor-state arbitration." U.S. Br. 1. The United States simply wants to preserve for itself every possible avenue of appeal in the event that it one day loses a jurisdictional dispute in an investment treaty arbitration.

Preliminarily, even if this Court were to adopt the Solicitor General's proposed standard, the proper judgment would be to reverse the D.C. Circuit, rather than to remand the case as he suggests. For the reasons given in Part II, *supra*, the relevant question is whether the state party "consented" to having the dispute resolved by arbitration *rather than* the ordinary processes of civil litigation in local courts. In this case, the Local Litigation Provision cannot fairly be characterized as a condition on Argentina's "consent" to arbitration. There is no serious argument that Argentina contemplated that a dispute with an investor would instead be resolved by the judiciary. As discussed, the Treaty guarantees *every* qualifying investor the right to demand that its claims will be decided by neutral arbitration. Without that assurance, foreign parties would be far less likely to invest in the first place. All the provision requires is that the investor wait for up to eighteen months while the matter is pending in a local court.

In any event, the Solicitor General's proposal lacks even the slightest merit. Its argument rests on the false premise – rejected by this Court in *Howsam* – that every condition related to "consent" determines the existence *vel non* of an arbitration agreement.

The Court's decisions establish that "preconditions to arbitration" do *not* determine the existence of an arbitration agreement and that a court presumptively does *not* review such objections de novo. Importantly, the United States does not dispute that the Local Litigation Provision is properly characterized as a precondition to arbitration. *See* Part II.A, *supra*. When, as here, the dispute is over a precondition to arbitration, arbitrators decide such questions of procedural arbitrability. *See* Part I, *supra*.

The argument of the United States is also directly contrary to the FAA. When, as in this case, an arbitration is "subject to the New York Convention, . . . judicial review of arbitral awards in the form of set-aside proceedings [is] governed by the law of the seat of arbitration." U.S. Br. 18. Under the FAA, the courts deferentially review rulings (including jurisdictional rulings) that the parties have agreed to submit to arbitration. This Court has squarely held – in a decision that the United States does not even acknowledge – that the statutory standard of review is binding in all cases. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008).

Further, nothing in the FAA, including Chapters 2 and 3 (on the New York and Panama Conventions), even hints at the application of a different regime for the review of state parties' objections to investment-treaty arbitrations. The only statute that does provide for special treatment of certain investment treaty cases – 22 U.S.C. § 1650a – bars *any* judicial review of awards rendered under the ICSID system

and makes an ICSID award equivalent to a final judgment of a state court.

That protection of Argentina's sovereignty does not require de novo judicial review is obvious from the fact that the Treaty also authorizes arbitration under the ICSID Rules, which preclude any judicial review whatsoever, including for jurisdictional assertions by state parties. U.S. Br. 3, 18. Argentina frequently submits disputes to ICSID arbitration; indeed, under many of its bilateral investment treaties, including those with the United States and France, the investor has the absolute right to select the ICSID system.[4] There is no logical reason that principles of sovereignty would require de novo review in this case but not those. The only issue is whether the Treaty establishes a precondition to arbitration, and that issue has nothing to do with Argentina's sovereignty.

The United States also gives no reason to conclude that it is more respectful of Argentina's sovereignty for a U.S. court to decide such a question de novo, rather than deferring to the ruling of an arbitral tribunal that Argentina participated in selecting and which was appointed for its expertise in such issues. The sovereign act that should be afforded paramount respect is Argentina's decision to sign the Treaty and thereby attract U.K. investment

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[4] *See, e.g.*, Treaty Between the United States and the Argentine Republic Concerning the Reciprocal Encouragement of Trade and Investment, U.S.-Arg., Nov. 14, 1991, S. Treaty Doc. No. 103; Agreement on the Reciprocal Promotion and Protection of Investments, Arg.-Fr., July 3, 1991, 1728 U.N.T.S. 281.

through promises that include the state's submission to international arbitration – even if Argentina now regrets that sovereign decision. *See, e.g.*, Case of the S.S. "Wimbledon" (Japan v. U.K.), 1923 P.C.I.J. (ser. A) No. 1, at 25 (Aug. 17) (recognizing that entering into treaties are exercises, and not abdications, of state sovereignty). Respect for sovereignty thus requires the proper construction of the Treaty, and the arbitral tribunal is the expert body chosen by the parties to do so.

Moreover, a ruling of a U.S. court second-guessing the arbitrators' ruling can equally be said to impinge upon the sovereign interest of the other party to the Treaty – the United Kingdom – to whom Argentina promised that it would arbitrate its disputes with U.K. nationals. To the extent respect for state parties' sovereign interests calls for *some* measure of judicial review, that is of course already provided by the FAA.

The standard proposed by the United States is deeply flawed for other reasons as well. There is no need for a distinct legal regime that would be applied only to the narrow sub-subclass of cases involving judicial review of arbitrators' jurisdictional rulings under bilateral and multilateral investment treaties. This Court's precedents adopt a presumptive allocation of responsibility between arbitrators and the federal courts. If the state parties expressly provide that a treaty requirement is a condition to the offer of arbitration, that fact might overcome a presumption that arbitrators decide its application. But that issue is entirely hypothetical because this is not such a case.

The standard proposed by the federal government would be unworkable. Indeed, despite having filed two briefs, the Solicitor General cannot decide whether the single provision *in this case* satisfies its proposed standard. The Solicitor General provides no guidance whatsoever regarding what principles of international law would guide the determination whether a particular requirement goes to a state party's "consent" to arbitration, in contrast to "non-consent-based jurisdictional and other threshold requirements." U.S. Br. 25. Nor does the United States even indicate how those unsettled principles might be identified objectively rather than made up by the lower courts. There is no reason to burden the U.S. courts with making such determinations, particularly when (as will often be the case) the United States is not even a signatory to the particular treaty.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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SUPPLEMENTAL BRIEF

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AND
BRIEF

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IN THE

Supreme Court of the United States

BG GROUP PLC,

Petitioner,

v.

REPUBLIC OF ARGENTINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

It comes as no surprise that the Solicitor General recommends that this Court deny certiorari. That is now the near-reflexive conclusion to almost every invitation brief. When the Court looks below the surface of that conclusion to the arguments advanced in support, however, it will find that its intervention is plainly warranted.

In particular, the United States rejects Argentina's attempt to rewrite the ruling below as holding that the parties never agreed to arbitrate. *See* BIO 1. The Solicitor General recognizes that petitioner properly "submitted the dispute to international arbitration under Article 8 of the Treaty." U.S. Br. 5. With this conclusion, the United States implicitly concedes that the issue presented is as framed by petitioner: whether the D.C. Circuit's decision allocating to itself jurisdictional competence over whether preconditions to arbitration have been satisfied can be squared with this Court's precedents and the decisions of four other circuits.

In nonetheless asserting that the D.C. Circuit's decision creates no conflict and raises no recurring question, the Solicitor General reasons in two steps. *First*, he claims that under "settled principles," U.S. Br. 9, a court asks anew in every case "whether, in entering into the particular" arbitration agreement, the parties intended a court or instead an arbitrator to decide whether a precondition to arbitration has been satisfied, *id.* 11. *Second*, he asserts that the D.C. Circuit's decision turned on two particular facts: that the precondition required litigation and appeared in a treaty. *Id.* 17-19.

The Solicitor General's legal error lies in the first step, which without explanation (or even acknowledgment) reverses the United States' prior position on this precise issue. *See infra* Part I. In fact, until the ruling below, it was settled that arbitrators determine compliance with preconditions to arbitration absent the parties' contrary agreement. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (applying *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 555-59 (1964)). Four circuits faithfully adhere to that principle. *See infra* Part II; Pet. 28-31. In square conflict with those decisions, the D.C. Circuit adopted the opposite rule: that courts determine compliance with preconditions to arbitration, absent clear and unmistakable evidence to the contrary.

The legal error concerning the presumptive responsibility for determining compliance with preconditions to arbitration proves that it makes no difference to the certiorari calculus that this case involves a litigation precondition contained in a treaty. The conflict arises from the D.C. Circuit's antecedent legal standard, which is not limited to cases involving international arbitration, treaties, or litigation preconditions. And that conflict was indisputably outcome determinative here. Neither the D.C. Circuit, nor Argentina, nor the United States even attempts to suggest that the fact that this case involves a litigation precondition in a treaty comes *anywhere close* to establishing an agreement by the parties to assign the decisional role to U.S. courts rather than arbitrators. As the many expert *amici* have explained, the importance of the Question Presented is beyond dispute. *See infra* Part III.

Certiorari accordingly should be granted.

I. The Solicitor General Ignores This Court's Repeated Holding That Absent The Parties' Agreement Arbitrators Rather Than Courts Determine Compliance With Arbitral Preconditions.

This Court has twice addressed the allocation of authority to determine compliance with preconditions to arbitration. In *Howsam*, the Court held that "in the absence of an agreement to the contrary," "issues of procedural arbitrability," such as whether "conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." 537 U.S. at 85. *Howsam* relied on the holding of *John Wiley & Sons*, 376 U.S. at 555-59, that an arbitrator, not a court, decides whether the pre-arbitral stages in the arbitration provisions of a labor contract have been completed. *See Howsam*, 537 U.S. at 84-85. And *Howsam* specifically rejected the court of appeals' contrary view that under *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995), compliance with preconditions is a question of substantive "arbitrability" to be decided by a court. *See Howsam*, 537 U.S. at 82-83.

There accordingly is no merit to the attempt of the D.C. Circuit and the Solicitor General to recharacterize this Court's decisions in *Howsam* and *John Wiley & Sons* as merely assessing the particular facts of those cases. Those decisions hold that unless the parties agree otherwise, arbitrators rather than courts determine compliance with arbitral preconditions.

Four circuits faithfully adhere to this Court's precedents. *See* Pet. 28-34. Even Argentina's brief in

opposition frankly recognizes the "cases from the First, Sixth, Seventh, and Eighth Circuits that have all held that compliance with preconditions to arbitration are for arbitrators to decide." BIO 15. All four circuits recognize that *Howsam* and *John Wiley* adopt a categorical rule, not a case-specific inquiry. *See Dialysis Access Center, LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 383 (1st Cir. 2011) (there is a "presumption that the arbitrator should decide whether the parties complied with such a procedural pre-requisite to arbitration"); *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 393 (6th Cir. 2008) (any "condition precedent to an obligation to arbitrate" is "presumptively allocated to the arbitrator"); *Lumbermens Mut. Cas. Co. v. Broadspire Mgm't Servs., Inc.*, 623 F.3d 476, 481 (7th Cir. 2010) ("[A] procedural question about a condition precedent to arbitration . . . is for the arbitrators to address"); *Int'l Brotherhood of Elec. Workers, Local 545 v. Hope Electrical Corp.*, 380 F.3d 1084, 1099 (8th Cir. 2004) ("[A]rbitrators and not judges are empowered to decide such issues").

It must be understood that, in attempting to deny the holdings of this Court and those four circuits, the Solicitor General is not writing objectively. Instead, the United States has a parochial interest in preserving the ruling below. As the United States acknowledges, it is often in the same position as respondent Argentina: a treaty signatory subject to foreign investors' claims, with a corresponding interest in challenging arbitral rulings finding that the investors have satisfied preconditions to arbitration. U.S. Br. 21-22 (explaining that the Question Presented arises regularly in the context of bilateral and multilateral

investment treaties to which the United States is a signatory, including particularly the North American Free Trade Agreement). Indeed, the "model" United States investment treaty requires an investor to, *inter alia*, "wait six months after the events giving rise to the claim before initiating arbitration." *Id.* 2. If the Solicitor General can persuade this Court to deny review, the United States will gain, in the D.C. Circuit, an additional ground for challenging adverse arbitral rulings.

Further, and perhaps for that reason, this Solicitor General has elected as a policy matter to reverse the vastly more pro-arbitration position previously taken by that office. In *Howsam*, the government took the exact opposite position that the threshold matters of arbitrability decided by the court must be "construe[d] narrowly," such that disputes "concern arbitrability *only* when they have involved one of two fundamental questions: whether the parties are bound by a valid arbitration agreement, and whether the subject matter of their underlying dispute falls within that agreement." S.G. Br., *Howsam* at 13-14 (emphasis added). In that case, the then-Solicitor General urged this Court to adopt a categorical rule that "'the question whether 'procedural' conditions to arbitration have been met' is presumptively for the arbitrator to decide." *Id.* at 16 (quoting *John Wiley*, 376 U.S. at 556-58). The United States recognized the possibility that the parties could affirmatively agree to assign the issue to the courts, but stated unequivocally that "any doubts about the parties' intent would be resolved in favor of the arbitrator's deciding." *Id.* at 17 n.5. This Court adopted exactly that rule in *Howsam*, 537 U.S. at 84-85, yet the brief in this case

announcing the new position of the Solicitor General does not even *acknowledge* that prior position or this Court's clear ruling in *Howsam* (and *John Wiley* before it) adopting a very strong presumption that arbitrators determine compliance with arbitral preconditions.

II. There Is No Merit To The United States' Characterization Of The D.C. Circuit's Ruling.

According to the Solicitor General, the D.C. Circuit did not adopt any generalizable legal rule. Instead, it merely considered the facts of this case to determine whether the treaty signatories intended arbitrators or instead courts to determine compliance with preconditions to arbitration. U.S. Br. 10-12. Even if that characterization of the ruling below were correct, certiorari would be warranted: this Court and four circuits reject such a free-flowing inquiry. They hold that the question is decided by arbitrators unless the parties agree to the contrary; the court of appeals found no such agreement. *See supra* Part I.

But in any event, the Solicitor General is wrong. The D.C. Circuit adopted the *opposite* presumption. The ruling below holds that courts determine compliance with a precondition to arbitration unless there is "clear and unmistakable" evidence to the contrary. *E.g.*, Pet. App. 10a; *id.* 11a-12a, 15a. In support of that conclusion, the court deemed compliance with the precondition to be a question of substantive arbitrability under this Court's decision in *First Options*. *See* Pet. App. 11a-12a. That is *precisely* the reasoning that this Court rejected in *Howsam*. *See supra* at 3.

Having deemed compliance with the precondition to be a question of substantive arbitrability, the D.C. Circuit applied its rule that the presumption that a court must decide the question can only be overcome by "clear and unmistakable" evidence. That presumption determined the court's ultimate holding in Argentina's favor. The court held:

> *Because* [1] the Treaty provides that a precondition to arbitration of an investor's claim is an initial resort to a contracting party's court, and [2] *the Treaty is silent* on who decides arbitrability when that precondition is disregarded, *we hold* that the question of arbitrability is an independent question of law for the court to decide.

Id. 15a (emphasis added). The court held that there cannot be "clear and unmistakable evidence" that the parties intended arbitrators to resolve compliance with the precondition, Pet. App. 15a, because "'[t]he Treaty does not directly answer' that question," U.S. Br. 7 (quoting Pet. App. 14a).

Other circuits would reach the opposite result. In the wake of *Howsam*, we have been unable to identify *any* other case *ever* finding that a contract contains an agreement to assign to the courts the responsibility to determine compliance with a precondition to arbitration. And, as noted, neither Argentina nor the Solicitor General seriously suggests that any feature of this case would persuade another circuit that this arbitration agreement contemplates that the courts would determine compliance with the arbitral precondition. The petition explained, and neither the United States nor Argentina disputes, that it makes no sense

whatsoever to say that treaty signatories would have intended a *domestic United States court* to construe the precondition in a treaty between Argentina and the United Kingdom, rather than the panel of expert international arbitrators whose appointment the treaty specifically contemplates. Cert. Reply 7; USCIB Br. 9-10. Indeed, the United States recognizes that the essential point of the arbitration provision is to assure investors that they will not be subject to the authority of the local judiciary. *See* U.S. Br. 18.

III. The Importance Of The Question Presented And Of This Case In Particular Are Undeniable.

Experts and organizations that deal daily with commercial arbitration have pleaded with the Court to recognize the broad significance of the ruling below and to intervene. *See generally* AAA Br.; USCIB Br. The United States makes much of the fact that this case arises from an arbitration under a treaty. But that argument ignores two fundamental points. *First*, the conflict created by the ruling below is antecedent to any examination of the facts: it arises from the D.C. Circuit's square holding that courts decide compliance with preconditions to arbitration absent clear and unmistakable evidence to the contrary.

Second, the Solicitor General ignores that the Question Presented arises regularly in all manner of commercial arbitration challenges, both domestic and international. Although there are some differences between treaty arbitration and domestic commercial arbitration, none has *any* relevance to this case, which Argentina correctly framed as a challenge to

the award under the Federal Arbitration Act, governed by this Court's decisions in *First Options*, *John Wiley*, and *Howsam*. In turn, as the Solicitor General admits, "the court of appeals applied principles articulated by this Court in cases involving arbitrability under private (and mostly domestic) agreements." U.S. Br. 13; *see* Pet. App. 10a-12a. Strikingly, after months spent reviewing the case, the United States cannot identify *any* relevant distinction. The reason is obvious: there is no relevant distinction to be drawn; there is no other potentially applicable body of law. Once the decision is properly viewed as establishing the principle that courts determine compliance with preconditions to arbitration, its grave implications are uncontested. *See, e.g.*, Professors & Practitioners Br. 1, 10-14; USCIB Br. 17-21.

The Solicitor General's hopeful assertion that the ruling below may "have few implications for the construction of international investment treaties" instead rests on its false premise that the decision is "case-specific" in nature. U.S. Br. 17. But as discussed, that is not correct. And the United States acknowledges that "dispute-resolution preconditions are common in international treaties," U.S. Br. 17-18, and that the proper treatment of those preconditions is an issue of recurring significance not only to international commerce but to the government's own litigation efforts under NAFTA. *Id.* 21-22. Further, there are "[n]early 3,000" similar treaties, which "often place conditions on an investor's resort to arbitration." *Id.* 1, 2.

When awards are entered in such cases, the parties can and often do litigate in U.S. courts. The

arbitrations are very often seated in this country, and generally "an aggrieved party may seek to set aside an award in a competent court of the jurisdiction in which the arbitration was seated." U.S. Br. 3. This case is a perfect example. In addition, no matter where an arbitration is seated, disputes over the award's validity can enter this country's courts through a petition to enforce the award. *See* 9 U.S.C. § 207.

The Solicitor General's alternative argument is that this case involves a "litigation" precondition. To be sure, every case must involve *some* type of precondition, none of which in isolation may be common enough to give rise to a distinct circuit conflict. But as discussed, that makes no difference to the certiorari determination. The court of appeals adopted a generalized rule, not one limited to those cases in which litigation is a precondition to arbitration. Conversely, this Court's precedents and the decisions of four other circuits adopt the opposite general rule – not one that exempts "litigation" preconditions. Of note, despite the Solicitor General's practiced expertise at denying circuit conflicts, the brief of the United States is unable to identify one word in any decision of any those four circuits that supports its view that Argentina might prevail under their settled rule.

As the *amici* explain, the D.C. Circuit's ruling undermines the finality of arbitration by inviting parties to bring judicial challenges to numerous and varied procedural rulings of arbitrators, arguing that in the particular case each decision was of a type that the parties in enacting that particular arbitration clause would have intended it to be resolved by a

court instead. Those challenges may be brought both before the arbitration commences and by a disappointed losing party afterwards. As the then-Solicitor General wrote in the government's brief in *Howsam*, those "judicial proceedings not only delay resolution of the underlying dispute but impose increased costs on the parties, a result that is contrary to the very reasons that the parties agreed to arbitration in the first place – to increase the speed and decrease the cost of resolving their dispute." S.G. Br., *Howsam* 18 (citing *John Wiley*, 376 U.S. at 558). The D.C. Circuit's approach also substantively reverses the assignment of responsibility between arbitrators and the judiciary, vastly expanding the matters that are presumptively for the courts to resolve. As a former Attorney-Adviser for the Department of State has explained:

> In urging the Supreme Court to deny the Petition, the SG disregards the long-established distinction between "admissibility" and "jurisdiction" in international law, the long-established distinction between procedural and substantive [arbitrability] in U.S. jurisprudence, and the threat that the D.C. Circuit's decision poses both to treaty and commercial arbitration in the United States.

Laurence Shore et al., *Commentary on the US Solicitor General's Office (CVSG) brief in* BG Group PLC v. Republic of Argentina *(May 2013)*, Transnational Dispute Management, May 16, 2013, at 1, *available at* http://hsf-arbitrationnotes.com/2013/05/17/cert-petition-in-the-bg-v-argentina-case-no-support-from-the-us-solicitor-general.

Those disinterested authorities are far more experienced than the Solicitor General on this point, as the Question Presented does not involve the operation of any governmental program. If this Court denies review in the wake of the resistance of the court of appeals and the extensive *amicus* submissions highlighting this as the most carefully watched arbitration case in the federal courts, it will sow considerable confusion regarding the meaning of a previously well-settled body of law. That result cannot be reconciled with "the need of the international commercial system for predictability in the resolution of disputes." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 629 (1985).

CONCLUSION

For the foregoing reasons, and those set forth in the petition and the *amicus* briefs, certiorari should be granted.

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AMICUS CURIAE BRIEF

No. 12-138

In the Supreme Court of the United States

BG GROUP PLC, PETITIONER

v.

REPUBLIC OF ARGENTINA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF VACATUR AND REMAND

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QUESTION PRESENTED

A bilateral investment treaty between Argentina and the United Kingdom provides that before a foreign investor may pursue arbitration of an investment dispute with the host State, the investor must first litigate the dispute for at least 18 months in the host State's courts. The question presented is:

Whether the court of appeals erred in undertaking de novo review of an arbitral tribunal's ruling that an investor's noncompliance with the litigation requirement did not preclude the tribunal from adjudicating the merits of the dispute.

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INTEREST OF THE UNITED STATES

This case concerns the proper framework for reviewing the decision of an arbitral tribunal seated in the United States concerning its authority to adjudicate an investment dispute arising under a bilateral investment treaty between two foreign Nations. The United States strongly supports the resolution of investment disputes through investor-state arbitration. The United States is a party to numerous investment treaties and free trade agreements incorporating investment chapters, including the North American Free Trade Agreement (NAFTA), which typically provide for investor-state arbitration. The proper interpretation of the dispute-resolution provisions of international investment instruments is a matter of importance to the United

States. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. Bilateral investment treaties (BITs) are agreements between two sovereign Nations undertaken to promote and protect investment on a reciprocal basis. A BIT typically affords various legal protections to covered investors and investments, including basic guarantees of nondiscrimination and prohibitions on expropriation in violation of international law. See Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* 4-7 (2010) (Vandevelde). A BIT typically also contains provisions for resolving disputes between the host State and covered investors of the other State with respect to covered investments, commonly through international arbitration.

States may decide in their investment treaties to place conditions on a host State's consent to arbitrate with an investor. For example, the United States' 2012 Model Bilateral Investment Treaty—which reflects current Executive Branch policy and serves as a template in negotiating new BITs—requires, among other things, that a foreign investor seeking to arbitrate a dispute with the United States provide advance written notice of its intent to pursue arbitration and waive any right to pursue other dispute-settlement procedures with respect to matters at issue in the arbitration. See U.S. Dep't of State, *2012 U.S. Model Bilateral Investment Treaty*, arts. 24-26, http://www.state.gov/documents/organization/188371.pdf.

BITs usually allow claimants to choose the arbitral forum in which arbitration will proceed. For instance, BITs may provide for arbitration before the International Centre for Settlement of Investment Disputes

(ICSID), which administers an international arbitral regime created pursuant to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159. With exceptions not relevant here, the ICSID arbitral regime is self-contained, in that ICSID awards are "directly enforceable in signatory states, without any method of review in national courts." 1 Gary B. Born, *International Commercial Arbitration* 106 (2009) (Born).

BITs also may contemplate dispute resolution before ad hoc arbitral tribunals convened under the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Rules), G.A. Res. 65/22, U.N. Doc. A/RES/65/22 (2011), or other such rules to which the parties to the arbitration may agree. See Vandevelde 434-435. The UNCITRAL Rules provide that arbitral panels have the authority to determine their own jurisdiction, although such determinations may be subject to judicial review. See generally David D. Caron & Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 450-459 (2d ed. 2012) (Caron). For arbitrations conducted under the UNCITRAL Rules or other such rules, an aggrieved party may seek to set aside an award in a competent court of the jurisdiction in which the arbitration was seated. See, *e.g.*, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) art. V(1)(e), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (award may be "set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made"). When an investor-state arbitral award subject to the New York Convention is rendered by a tribunal seated in the United States, a

party may seek to set aside the award in accordance with the vacatur procedures set forth in the Federal Arbitration Act (FAA). 9 U.S.C. 10, 208, 307.

2. a. In 1990, respondent Republic of Argentina entered into a BIT with the United Kingdom. See Agreement for the Promotion and Protection of Investments, Arg.-U.K., Dec. 11, 1990, 1765 U.N.T.S. 33 (Treaty). The Treaty provides that any dispute between an "investor of one Contracting Party and the other Contracting Party * * * shall be submitted" to a court "of the Contracting Party in whose territory the investment was made." Treaty art. 8(1); Pet. App. 3a. The matter then "shall be submitted to international arbitration" when one of the parties requests, "where, after a period of eighteen months has elapsed" from the submission of the dispute to the local court, "the said tribunal has not given its final decision," or where the court issues a final decision but the parties are "still in dispute." Treaty art. 8(2); Pet. App. 24a n.2. The Treaty contemplates arbitration under various arbitral rules, including the ICSID system and the UNCITRAL Rules. Treaty art. 8(3).

b. Petitioner BG Group PLC, a United Kingdom company, invested in an Argentine company that had been granted a 35-year exclusive license to distribute gas. Pet. App. 4a-5a. In 2001, Argentina experienced a severe economic crisis, and the government enacted an emergency law that implemented economic measures that had a substantial impact on petitioner's investment. *Id.* at 5a, 62a.

The emergency law authorized the creation of a "renegotiation" process intended to ameliorate the law's adverse effects, but it also barred from participating "any licensee that sought redress in an arbitral or other

forum." Pet. App. 5a, 131a. The government also enacted a decree temporarily staying the country's compliance with injunctions or final judgments in lawsuits related to the emergency law. *Id.* at 5a.

3. a. In 2003, petitioner invoked international arbitration under Article 8 of the Treaty. Pet. App. 25a. Petitioner argued that Argentina's emergency measures violated the Treaty. *Id.* at 25a-26a. Among other grounds for resisting arbitration, Argentina contended that petitioner had failed to comply with the Treaty's requirement that an investor first submit the dispute for litigation in an Argentine court. *Id.* at 162a-163a.

b. In 2007, the arbitral tribunal, seated in Washington, D.C., issued a decision rejecting Argentina's threshold objections and ruling in favor of petitioner on the merits. Pet. App. 92a-306a.

The tribunal held that petitioner had properly initiated arbitration. Pet. App. 161a-171a. Applying principles of treaty interpretation, the tribunal reasoned that it would be "absurd or unreasonable" to mandate compliance with the Treaty's litigation requirement here because Argentina had unilaterally hindered "recourse to the domestic judiciary." *Id.* at 159a n.128, 165a-166a; Vienna Convention on the Law of Treaties (Vienna Convention) art. 32, May 23, 1969, 1155 U.N.T.S. 331.

4. In 2008, Argentina filed this suit in the United States District Court for the District of Columbia, seeking to vacate the arbitral award under the FAA and the New York Convention.[1] Petitioner cross-petitioned to

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[1] This case is unlike other cases in which Argentina has refused, contrary to its international legal obligations, to comply with final arbitral awards entered against it for which all applicable review mechanisms have been exhausted. See, *e.g.*, 77 Fed. Reg. 18,899 (Mar. 29, 2012) (Presidential Proclamation suspending special trade privileges

confirm the award. The district court rejected Argentina's argument that the tribunal exceeded its powers by excusing the litigation requirement, see 9 U.S.C. 10(a)(4), concluding that the arbitrators' interpretation of the Treaty was colorable. The court then confirmed the award. Pet. App. 21a-57a.

5. The court of appeals reversed the district court's judgment and vacated the award, concluding that the arbitral tribunal had exceeded its powers by allowing arbitration to proceed. Pet. App. 1a-20a.

The court of appeals first considered whether the court or the arbitral tribunal should determine the effect of petitioner's failure to comply with the litigation requirement on the tribunal's authority to adjudicate the dispute. The court observed that "[t]he Treaty does not directly answer" that question. Pet. App. 14a. The court explained that when the precondition is of the sort that "the contracting parties would likely have expected a court to have decided," *id.* at 11a (quoting *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)), "'[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clea[r] and unmistakabl[e] evidence that they did so,'" *id.* at 10a (quoting *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995)). The court concluded that the Treaty parties would have expected a court to determine the effect of noncompliance with the litigation requirement. *Id.* at 15a. Employing de novo review, the court of appeals held that petitioner "was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration," and that the arbitral tribu-

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for Argentina based on a finding that it had not acted in good faith in failing to pay arbitral awards owed to U.S. companies).

nal had therefore lacked jurisdiction over the parties' dispute. Pet. App. 19a-20a.

SUMMARY OF ARGUMENT

In an action to set aside an investor-state arbitral award subject to the New York Convention, the standard by which a court should review the arbitral tribunal's resolution of objections to arbitration turns on whether the objection concerns the investor's alleged failure to comply with a condition on the State's consent to arbitrate, such that there is no arbitration agreement between the State and the investor. If the objection rests on such a condition, it is appropriate and consistent with the practice in certain other States that often serve as seats of arbitration for courts to review the arbitral ruling de novo. Courts should deferentially review rulings on other threshold objections that do not call into question the existence of an investor-state arbitration agreement, including those often referred to in international arbitration as "jurisdictional" objections, unless the treaty provides that the arbitral tribunal's authority to rule on such matters is limited. In determining whether a treaty requirement is a condition on the State's consent to arbitrate, a reviewing court should not employ presumptions derived from domestic contract law, but should instead apply principles of treaty interpretation in examining the treaty's text and other relevant materials for determining the treaty parties' intent.

I. In the context of private arbitration, this Court has held that the standard by which a court should review an arbitral tribunal's resolution of objections to arbitration turns on whether the parties agreed to submit that question to arbitration. *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995); *Howsam* v.

Dean Witter Reynolds, Inc., 537 U.S. 79, 83-84 (2002). The Court has further held that while "question[s] of arbitrability" are presumptively for the courts to decide independently, "'procedural' questions" concerning the requirements for submitting claims to arbitration are presumptively for arbitrators. *Howsam*, 537 U.S. at 83-84.

II. The presumptions set forth in *First Options* and *Howsam* cannot be applied wholesale to the distinct context of investor-state arbitral proceedings conducted pursuant to investment treaties. Investor-state arbitration is, like private arbitration, a matter of consent. But in the investor-state context, the relevant agreement concerning the arbitral tribunal's authority is contained in the investment treaty itself and is therefore a function of the *treaty* parties' shared intent.

An investment treaty typically sets forth a State's standing offer to arbitrate certain categories of disputes with covered investors, and it generally permits investors a choice of multiple arbitral rules, including the ICSID Arbitration Rules, which preclude judicial review. As a result, while treaty parties generally contemplate, consistent with the UNCITRAL or applicable arbitral rules, that the arbitral tribunal will adjudicate objections to arbitration in the first instance, they do not usually have a specific agreement, in the *First Options* sense, as to whether the arbitral tribunal or any reviewing court has authority to finally resolve such disputes across the board. Applying the *First Options* and *Howsam* presumptions wholesale to investment treaties would graft onto those treaties default provisions that the treaty parties did not anticipate.

In arbitrations governed by the New York Convention, the appropriate scope of judicial review of arbitral

rulings on objections to arbitration depends on whether the objection goes to the host State's consent to enter into an arbitration agreement with the investor. Because an investment treaty is structured as a standing offer to arbitrate, States may condition their consent to enter into an arbitration agreement with any individual investor on the investor's compliance with certain of the treaty's requirements. When present, such conditions serve the important sovereign function of limiting the terms under which the host State is willing to have claims adjudicated against it in an arbitral forum. In the event of noncompliance with such a condition, no arbitration agreement is formed, and the arbitrator lacks authority to rule on any dispute between the parties. To defer to an arbitral tribunal's ruling in that situation would be to assume the very arbitral authority that the State denies ever arose. It is therefore appropriate to review independently an arbitral tribunal's ruling on a party's threshold objection that no arbitration agreement exists.

By contrast, courts should review deferentially the tribunal's resolution of objections that are not based on noncompliance with a condition on consent to arbitration. When a valid arbitration agreement exists, the State and the investor contemplate that the arbitral tribunal has authority to rule on investment disputes between the parties as set forth in the treaty. It is generally understood in international practice, moreover, that the arbitral tribunal has authority to rule on objections to arbitration in the first instance, consistent with the applicable arbitral rules. When an arbitration agreement exists, the rationales that support deferring to arbitral rulings on substantive issues—the treaty's purpose of providing for resolution of investor-state

disputes through expert arbitration and the arbitrators' superior international investment law expertise—also apply to arbitral rulings on threshold objections that do not go to the issue of consent, including objections to the arbitrator's jurisdiction. Accordingly, such issues should be reviewed by United States courts under the same deferential standard that governs rulings on the merits, unless the treaty provides that the arbitral tribunal's authority is more limited.

III. The Court should remand this case to permit the court of appeals to determine, applying principles of treaty interpretation, whether the Treaty's litigation requirement is a condition to Argentina's consent to arbitrate. The court of appeals should then apply the appropriate standard of review to the arbitral panel's ruling on Argentina's objection to arbitration.

ARGUMENT

This case presents the question whether, in an action to set aside an investor-state arbitral award subject to the New York Convention, the court should review de novo the arbitral tribunal's ruling on an investor's compliance with a requirement of prior litigation in the host State's courts in a bilateral investment treaty, or instead should review the ruling under the same deferential standard that applies to the tribunal's ruling on the merits. The Convention does not establish a standard of review governing vacatur proceedings, but contemplates that the reviewing court will generally apply the set-aside law of the country in which (or under the law of which) the award was made—in this case, the FAA. New York Convention art. V(1)(e); *Yusuf Ahmed Alghanim & Sons, W.L.L.* v. *Toys "R" Us, Inc.*, 126 F.3d 15, 19-21 (2d Cir. 1997), cert. denied, 522 U.S. 1111 (1998). Argentina contends that the arbitral tribunal

exceeded its powers, 9 U.S.C. 10(a)(4), by proceeding to adjudicate the merits of the parties' investment dispute even though Argentina had agreed to arbitrate only after the investor had first submitted the dispute to Argentina's courts and allowed 18 months for its resolution.[2] Resp't C.A. Br. 11-16. The parties disagree over whether the courts should review the arbitral tribunal's resolution of that question independently or deferentially.

In the context of private commercial arbitration agreements, this Court has held that while parties are presumed to have expected arbitrators to have primary authority to decide "'procedural' questions" concerning the requirements for submitting claims to arbitration, subject to deferential review, "question[s] of arbitrability" are presumptively for the courts to review independently. *Howsam*, 537 U.S. at 83-84. In the distinct context of investor-state arbitral proceedings conducted pursuant to investment treaties, courts should not apply

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[2] Although a majority of the courts of appeals have concluded that the Convention permits a court to invoke the set-aside grounds provided in the FAA, 9 U.S.C. 10, in reviewing a set-aside challenge to a nondomestic award, some courts have suggested that domestic grounds for set-aside may conflict with the Convention to the extent they go beyond the grounds for denying recognition of an award enumerated in Article V of the Convention. See *Industrial Risk Insurers* v. *M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434 (11th Cir. 1998), cert. denied, 525 U.S. 1068 (1999); Restatement (Third) of the U.S. Law of International Commercial Arbitration (Restatement), § 4-11, cmt. a & reporter's note (Tentative Draft no. 2, 2012). The Court need not decide that question, as the FAA set-aside ground on which Argentina challenges the award—that the arbitral tribunal exceeded its authority by deciding a dispute that the parties did not agree to arbitrate, 9 U.S.C. 10(a)(4)—is also a ground for denying recognition under the Convention. See New York Convention art. V(1)(a); Restatement § 4-12 & cmt. a, b, and d.

that interpretive framework wholesale, but instead should review de novo arbitral rulings on consent-based objections to arbitration, and review deferentially rulings on other objections.

I. IN THE CONTEXT OF PRIVATE COMMERCIAL ARBITRATION, WHETHER THE ARBITRAL TRIBUNAL HAS PRIMARY POWER TO RESOLVE OBJECTIONS TO ARBITRATION TURNS ON THE PARTIES' AGREEMENT, INTERPRETED ACCORDING TO PRESUMPTIONS REFLECTING THEIR LIKELY EXPECTATIONS

A. Because "arbitration is a matter of consent, not coercion," *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010), the jurisdiction of an arbitral tribunal to resolve a dispute depends on whether the parties have agreed to arbitrate the matter. See *First Options*, 514 U.S. at 943; *AT&T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 649 (1986). This Court has referred to questions concerning whether an arbitrator is empowered to decide a particular dispute as questions of "arbitrability."[3] *First Options*, 514 U.S. at 942.

When a party objects to the propriety of submitting a particular dispute to arbitration, the question arises

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[3] The term "arbitrability," as employed in United States law, diverges from its meaning elsewhere. In international practice, the term is used more narrowly to refer to whether, as a matter of public policy, a particular type of dispute is capable of resolution through arbitration. Other questions that are considered issues of "arbitrability" in the United States—including the existence or validity of the parties' arbitration agreement—are typically referred to elsewhere as matters of arbitral "jurisdiction" or "competence." See generally Lawrence Shore, *The United States' Perspective on 'Arbitrability,' in Arbitrability: International & Comparative Perspectives* 69-83 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009).

whether a court or arbitrators should rule upon that objection. If the arbitrators have "primary power" to rule on the objection, the "court reviews their arbitrability decision deferentially." *First Options*, 514 U.S. at 942 (emphasis omitted). If the court has primary power, "the court makes up its mind about arbitrability independently," either by engaging in de novo review of the arbitrators' decision on arbitrability or, if the parties are litigating in advance whether arbitration is required, by conclusively resolving the issue for itself. *Ibid.* Whether the court or the arbitrator "has the primary power to decide arbitrability," *id.* at 943 (internal quotation marks omitted), turns on whether the parties have agreed "to arbitrate 'gateway' questions of 'arbitrability,'" *Rent-A-Center, West, Inc.* v. *Jackson*, 130 S. Ct. 2772, 2777 (2010).

B. In the context of private commercial arbitration, this Court has held that in "deciding whether the parties agreed to arbitrate a certain matter (including arbitrability)," courts "should apply ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944. To guide that determination, however, the Court employs a set of "interpretive" presumptions based on the nature of the question at issue and the Court's understanding of what the parties would likely have agreed upon had they considered the matter expressly. *Rent-A-Center*, 130 S. Ct. at 2777 n.1.

Generally, in the private commercial context, the Court presumes that the parties did not agree to arbitrate "question[s] of arbitrability," a category that includes "whether the parties are bound by a given arbitration clause" and whether a particular dispute falls within the scope of an arbitration clause. *Howsam*, 537 U.S. at 83-84; *First Options*, 514 U.S. at 945. According-

ly, unless the arbitration agreement contains "clea[r] and unmistakabl[e] evidence" that the parties agreed to arbitrate those questions, the court will decide the issue independently. *Id.* at 944 (internal quotation marks omitted). Conversely, when the objection to arbitration is one that the parties likely would have expected the arbitrator to decide, such as "'procedural' questions that grow out of the dispute and bear on its final disposition"—including "allegation[s] of waiver, delay, or a like defense to arbitrability"—the Court presumes that the parties intended to assign the arbitrator primary responsibility for deciding the issue. *Howsam*, 537 U.S. at 84 (citation omitted), 86.

II. WHEN AN INVESTOR-STATE ARBITRAL AWARD IS SUBJECT TO SET-ASIDE PROCEEDINGS, THE COURT SHOULD INDEPENDENTLY REVIEW ARBITRAL RULINGS ON OBJECTIONS BASED ON THE LACK OF A VALID ARBITRATION AGREEMENT, AND SHOULD PRESUMPTIVELY REVIEW OTHER RULINGS DEFERENTIALLY

This Court has not yet had occasion to consider whether its existing precedents, all of which concerned questions of arbitrability arising under private commercial agreements, should apply to objections to arbitration undertaken pursuant to investment treaties—here, an objection pertaining to an investor's compliance with a litigation requirement in an investment treaty. Petitioner contends that this Court should apply *First Options* and *Howsam* to the investment-treaty context, and hold that under *Howsam*, responsibility to adjudicate objections to arbitration based on non-compliance with any procedural "precondition to arbitration" under the investment treaty "presumptively lies with the arbitrators." Pet. Br. 31. In this case, petitioner asserts, com-

pliance with the litigation requirement should be deemed to be such a precondition. Applying *First Options* and *Howsam* wholesale to investment treaties, however, would be inconsistent with principles of treaty interpretation and the treaties' structure. Rather, the judicial standard of review should turn on the nature of the objection under the applicable treaty. Courts should review de novo arbitral rulings concerning objections based on the asserted lack of a valid agreement to arbitrate, even if the absence of an agreement is caused by a failure to comply with a requirement that resembles what might be viewed as a "procedural" matter or a mere "precondition" to arbitration in a private commercial dispute. Rulings on other objections should be reviewed deferentially, unless the treaty provides that the arbitral tribunal's authority to rule on such matters is more limited.

A. The Standard Of Review Of Arbitral Rulings On Threshold Objections To Arbitration Under Investment Treaties Is Not Governed By The Presumptions Set Forth In *First Options* And *Howsam*

1. As in the private context, arbitration between a State and a foreign investor under an investment treaty is fundamentally a matter of consent. Christopher F. Dugan et al., *Investor-State Arbitration* 219 (2008) (Dugan). The arbitral tribunal's authority therefore arises from, and is limited by, the consent of the parties. Christoph Schreuer, *Consent to Arbitration*, *in The Oxford Handbook of International Investment Law* 830, 831 (Peter Muchlinski et al. eds., 2008) (Schreuer); Vandevelde 433; Jeswald W. Salacuse, *The Law of Investment Treaties* 385 (2010) (Salacuse).

A crucial distinction between investor-state and private commercial arbitration, however, is that in the

investor-state context, the relevant agreement concerning the arbitral tribunal's authority is contained in the investment treaty itself and reflects the *treaty* parties' agreement. An investment treaty typically sets forth a host State's standing offer to arbitrate certain categories of disputes with a class of investors from the other contracting State, and the "offer includes the various terms and conditions contained in the * * * investment treaty." Salacuse 381. The actual "arbitration agreement" between the disputing parties comes into being only after an investor accepts the host State's offer by initiating arbitration against the State in the manner provided in the treaty. See Dugan 222; Vandevelde 437. The treaty itself therefore sets forth the prerequisites to consent and the parameters of the contemplated arbitration proceedings—the types of disputes covered, and the procedures governing arbitration. If a foreign investor properly initiates arbitration in accordance with the treaty's conditions, those terms become part of the arbitration agreement between the host State and the investor. Dugan 207. It is therefore the shared intent of the *treaty* parties, not the disputing parties, that determines the existence and substance of an agreement to arbitrate.

As a result, questions concerning the treaty parties' agreement—and therefore the existence and substance of a contracting State's agreement to arbitrate with an individual investor—are matters of treaty interpretation, and are not governed by any nation's domestic contract law. See Gary B. Born, *International Arbitration: Law and Practice*, § 16:01[B], at 420 (2012). Under principles of interpretation that this Court has applied to treaties to which the United States is a party, a court begins "with the text of the treaty and the context

in which the written words are used." *Air France* v. *Saks*, 470 U.S. 392, 397 (1985). Because a treaty is negotiated between two sovereign States, the court must "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Id.* at 399; see *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 223 (1996). Although this case involves a treaty between two foreign Nations, those basic principles of treaty interpretation are generally adhered to among Nations. See Vienna Convention art. 31.1 ("[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose").[4]

2. In an investment treaty, the States parties typically do not address the arbitration of any particular dispute. The host State's standing offer to arbitrate under the treaty is made with respect to a class of investors as a whole. See, *e.g.*, Gus Van Harten, *Investment Treaty Arbitration and Public Law* 63 (2007). Multiple investors may accept a single state offer of arbitration, and a single treaty may therefore lead to multiple investor-state arbitrations. A treaty generally provides an investor with an option of several forums in which to pursue arbitration, and it generally leaves the seat of arbitration—and thus the national law that will govern any set-aside proceedings—for later determination by the parties to a particular dispute or by the arbitral tribunal. See David Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* ¶ 17.27, at 596-597 (2d ed. 2010).

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[4] Although the United States is not a party to the Vienna Convention, the United States generally recognizes it as an authoritative guide to treaty interpretation.

Investment treaties may permit investors to pursue arbitration under the ICSID Arbitration Rules, which do not permit judicial review of arbitral awards. Vandevelde 434-435. Alternatively, investors may choose to initiate arbitration under separate rules subject to the New York Convention, which provides for judicial review of arbitral awards in the form of set-aside proceedings governed by the law of the seat of arbitration and recognition proceedings under Article V of the Convention. While the States parties to an investment treaty generally contemplate that the arbitral tribunal will initially resolve objections to arbitration, subject to judicial review in cases subject to the Convention, they do not ordinarily agree, in the *First Options* sense, as to whether the arbitral tribunal or any reviewing court has authority definitively to resolve such disputes across the board. Nor do the treaty parties, at the time they enter into the treaty, ordinarily have specific expectations as to the availability or scope of judicial review of an arbitral tribunal's resolution of threshold objections in any particular dispute.

3. *First Options* and *Howsam* set forth default rules governing whether the court or the arbitral tribunal has authority to finally resolve particular objections to arbitration, based on the Court's understanding of what the parties to private commercial arbitration agreements would have agreed to had they considered the matter expressly. See pp. 12-14, *supra*. But, as noted above, States parties to an investment treaty do not ordinarily establish in the treaty itself the scope (or availability) of judicial review. Those matters are determined later, when the investor chooses to arbitrate under the ICSID Arbitration Rules (where available) or, in other arbitrations, when the investor and the host State select the

place of arbitration. There is no reason to read into an investment treaty—especially one, as here, to which the United States is not a party—the specific interpretive presumptions set forth in *First Options* and *Howsam* concerning private commercial arbitration under United States law. Applying those presumptions wholesale to investment treaties, without taking into account distinct sovereign interests of the contracting States, would graft onto those treaties default provisions that would not necessarily reflect the parties' expectations. See *Zicherman*, 516 U.S. at 223.

B. Under An Investment Treaty, Courts Presumptively Should Independently Review Objections Based On The Absence Of An Agreement To Arbitrate And Deferentially Review Other Objections

In investor-state arbitrations governed by the New York Convention, the appropriate scope of judicial review of arbitral rulings on objections to arbitration depends on whether the objection concerns the host State's consent to enter into an arbitration agreement with the investor. When treaty parties agree that particular treaty requirements are conditions on their consent, they necessarily agree that if an investor fails to comply with those conditions, no agreement to arbitrate with that investor is formed. Because the absence of a valid arbitration agreement prevents the arbitral tribunal from obtaining authority to rule on *any* dispute between the parties, it is appropriate for a reviewing court to independently evaluate objections based on noncompliance with conditions on consent. Once an arbitration agreement is formed, however, it is as a general matter most consistent with the basic purpose of investment treaties for courts to review deferentially the tribunal's resolution of other objections to arbitra-

tion, including non-consent-based objections to the tribunal's "jurisdiction" (see n.3, *supra*).

1. Investment treaties set forth a State's standing offer to arbitrate in multiple forums, subject to any conditions on its consent to arbitrate that limit the arbitral tribunal's final authority to adjudicate an individual dispute

Because an investment treaty is structured as a standing offer to arbitrate, States parties may condition their consent to enter into an arbitration agreement with any individual investor on that investor's compliance with particular treaty requirements. For instance, the investment chapter of the United States-Korea Free Trade Agreement articulates several "conditions and limitations on [the] consent of each [State] party," including a requirement that a claimant desiring arbitration against the State furnish a "written waiver * * * of any right to initiate or continue" a proceeding in any other forum based upon the same claim. United States-Korea Free Trade Agreement art. 11.18, Feb. 10, 2011, http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text. Similarly, the three States parties to NAFTA, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993)—the United States, Canada, and Mexico—agree that Article 1121 of that agreement provides conditions upon the consent of each State to arbitration under that treaty. See, *e.g.*, *Methanex Corp.* v. *United States*, Memorial on Jurisdiction and Admissibility of Respondent United States of America, at 74-75, UNCITRAL (Nov. 13, 2000) (under NAFTA, no agreement to arbitrate is formed when conditions on consent are unfulfilled); *Mondev Int'l Ltd.* v. *United States*, ICSID Case No. ARB(AF)/99/2, Rejoinder on Compe-

tence and Liability of Respondent United States of America at 61-62 (Oct. 1, 2001); Schreuer 850.

If a condition on the State's consent to arbitrate with an investor is not satisfied, no arbitration agreement will be formed when the investor attempts to initiate arbitration. See *Waste Mgmt., Inc.* v. *United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award ¶ 16 (June 2, 2000), 40 I.L.M. 56, 63 (2001) (NAFTA). Because an arbitrator's authority to resolve any dispute between the parties must arise from the existence of an arbitration agreement between them, see p. 15, *supra*, in the absence of the host State's consent and of any resulting agreement, the arbitrator will lack any authority to consider any dispute between the parties. See *Waste Mgmt.* ¶¶ 16-17, 40 I.L.M. at 63 ("the entire effectiveness of this institution depends" on "fulfillment of the prerequisites established as conditions precedent to submission of a claim to arbitration," because those conditions pertain to "consent to arbitration"); 1 Born 893; cf. *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 547 (1964) (a party cannot be compelled to arbitrate if it never entered into an agreement to do so).

States expect an arbitral tribunal—and if necessary, a reviewing court—to enforce conditions on a State's consent to form an investor-state agreement. In entering into an investment treaty, a State acts in its sovereign capacity to establish a legal regime under which the State will consent to an adjudication of disputes against it by private parties. When present, conditions on the formation of an arbitration agreement—like limitations on a waiver of sovereign immunity to a suit in court—can serve important sovereign functions by limiting the terms under which the sovereign State may be subject to such proceedings against it. Dugan 219. And once an

arbitration agreement is formed by an investor's valid initiation of arbitration under the treaty, the consequences for a State can be significant: investor-state disputes may often implicate the State's national economic and regulatory policies and entail large financial stakes. Salacuse 355. Conditions on consent therefore can protect States' sovereign interests in a variety of ways, by establishing mandatory steps an investor must take to invoke arbitration. For instance, a treaty that makes waiving pursuit of alternative remedies a condition on consent (see p. 20, *supra*) protects the State from parallel proceedings and double recoveries.

2. When States parties make a treaty requirement a condition on consent, it is appropriate for a reviewing court to engage in de novo review of compliance with that condition

By providing in a treaty that a particular requirement is a condition on a State's consent to enter into an arbitration agreement with an individual investor, the treaty parties contemplate that the arbitral tribunal and courts engaging in judicial review under the Convention will enforce the condition as written. If the condition is unfulfilled, no agreement to arbitrate is formed, and the arbitrator never gains any authority to rule on any dispute between the parties—including on whether an arbitration agreement exists. See *China Minmetals Materials Imp. & Exp. Co.* v. *Chi Mei Corp.*, 334 F.3d 274, 288 (3d Cir. 2003). To defer to an arbitral tribunal's ruling where the host State denies that it entered into an arbitration agreement with the particular investor would thus be to assume the very arbitral authority that the State denies ever arose.

As a result, it is generally recognized that "where a party denies ever having concluded an agreement to

arbitrate, there is no basis for concluding, without independent judicial assessment, that a party has agreed to submit any issues, including jurisdictional issues, to the tribunal." 2 Born 2792; *John Wiley*, 376 U.S. at 547; *China Minmetals*, 334 F.3d at 288; *Dallah Real Estate & Tourism Holding Co.* v. *Ministry of Religious Affairs, Gov't of Pakistan*, [2010] UKSC 46 ¶ 30, [2011] 1 A.C. 763 ("The tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all."). When the existence of the agreement is disputed, therefore, the "possibility of de novo judicial review of any jurisdictional award in an annulment action is logically necessary."[5] 2 Born 2792;

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[5] Petitioner argues (Br. 48-52) that an investment treaty's incorporation of the UNCITRAL Rules, which state that the arbitral tribunal has authority to resolve threshold objections, including objections to the existence of the agreement, indicates the treaty parties' intent to grant the tribunal authority to finally resolve such objections. See UNCITRAL Rules art. 21(1), G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (1976). But if the State and the investor have not entered into any arbitration agreement, they also have not agreed that the tribunal has authority to finally resolve the existence of the agreement. 1 Born 870; see *China Minmetals*, 334 F.3d at 285-289; cf. U.S. Amicus Br. at 28-29, *Howsam*, *supra* (where existence of arbitration agreement was undisputed, agreement's incorporation of rules giving arbitrator authority to resolve timeliness issue indicated that parties had agreed to empower arbitrator to resolve that issue). In addition, although some domestic courts have construed agreements incorporating the UNCITRAL Rules to indicate that the parties intended deferential judicial review, see, *e.g.*, *Schneider* v. *Kingdom of Thailand*, 688 F.3d 68, 73 (2d Cir. 2012), other authorities construe such provisions as simply empowering arbitrators to consider jurisdictional objections in the first instance, subject to the applicable level of judicial scrutiny, Caron 451-452 & nn.13-14 (citing drafting history of the UNCITRAL Rules).

Restatement (Third) of the U.S. Law of International Commercial Arbitration § 4-12, cmt. d (Tentative Draft no. 2, 2012) ("[a] court reviews de novo an arbitral tribunal's determination of whether an arbitration agreement exists").

Accordingly, although different States' national laws concerning judicial review of arbitral rulings on objections to arbitration may vary, courts in several States that commonly serve as seats for investor-state arbitration generally review de novo whether an arbitration agreement exists. See, *e.g.*, *Republic of Ecuador/Chevron Corp.*, Rechtbank's-Gravenhage [District Court of the Hague], 2 mei 2012, 38694/HA ZA 11-402 en 408948/HA ZA 11-2813, ¶ 4.11 (Neth.) (translated by Harm Lassche, May 4, 2012) (objection that no arbitration agreement was formed pursuant to BIT was subject to de novo review, but other objections to arbitration were primarily for arbitrators to decide); *Dallah*, [2010] UKSC 46 ¶ 104 (English courts are "entitled (and indeed bound) to revisit the question of the tribunal's decision on jurisdiction if the party resisting enforcement seeks to prove that there was no arbitration agreement"); George A. Bermann, *The 'Gateway' Problem in International Commercial Arbitration*, 37 Yale J. Int'l L. 1, 18-19 (2012) (describing French practice); William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 Am. Rev. Int'l Arb. 133, 134-136 (1997) (Swiss practice). Similarly, the New York Convention provides that a court considering a pre-arbitration challenge to arbitration where "the parties have made an agreement" to arbitrate "shall * * * refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." New York Convention art. II(3).

The clear implication is that the court may independently determine that no valid agreement exists, even though the arbitral tribunal has not considered the issue, and may then decline to refer the dispute to arbitration. See 1 Born 977.

Thus, it is appropriate for courts in the United States, on review under the Convention and the FAA, to review de novo the arbitral tribunal's resolution of objections based on an investor's non-compliance with a condition on the State's consent to enter into an arbitration agreement. Indeed, this rule is also consistent with *First Options* itself, which establishes even in the context of private commercial arbitration that the existence of an agreement to arbitrate is presumptively for the Court to decide independently. 514 U.S. at 944-945.

3. Courts presumptively should review deferentially arbitral rulings on all non-consent-related objections to arbitration

Once an arbitration agreement exists between the State and an investor under an investment treaty, any objections to arbitration will concern whether the particular dispute the investor has raised is properly subject to arbitration under the terms of the arbitration agreement—for instance, the State may object that the investor has not complied with non-consent-based jurisdictional and other threshold requirements. Courts presumptively should review such rulings using the same deferential standard that applies to arbitral rulings on the merits, unless the treaty provides that the tribunal's authority is more limited. That approach is most consistent with investment treaties' general and overarching purpose of attracting investment by providing for a neutral and effective means of resolving investment disputes.

When the investor has initiated arbitration in compliance with the relevant treaty conditions, the resulting arbitration agreement then confers on the arbitral tribunal authority to resolve disputes between the parties in accordance with the treaty. See p. 15, *supra*. It is generally understood in international practice, moreover, that when a valid arbitration agreement exists, the arbitral tribunal has authority to resolve objections to arbitration in the first instance, consistent with the rules that apply to the particular arbitration. 1 Born 856; see also New York Convention art. II(3). Accordingly, many arbitral rules, including the UNCITRAL Rules, empower arbitrators to resolve objections to their own jurisdiction, subject to judicial review determined by the place of arbitration in accordance with the New York Convention. Many investment treaties incorporate those rules. Pet. App. 4a; 1 Born 864.

Because the existence of a valid arbitration agreement gives the arbitral tribunal authority to rule on the dispute between the parties, the rationales that support deferring to arbitral rulings on substantive issues apply with equal force to rulings on non-consent-based threshold issues. An investment treaty that provides for arbitration reflects the States parties' conclusion that arbitration is preferable to litigation as a neutral means of resolving international disputes with investors. Dugan 42, 51-52. To subject arbitral awards to searching review on the merits would vitiate that purpose by rendering the arbitral proceedings a mere prelude to independent judicial review. De novo judicial review of arbitral rulings concerning threshold objections to arbitration not going to the existence of an agreement would similarly undermine the treaties' purpose by enabling parties dissatisfied with an arbitral award to attempt to

overturn the award on a broad range of threshold grounds. While de novo review of objections based on the absence of an arbitration agreement is necessary to ensure that the host State is not forced to arbitrate against its will, reviewing arbitral rulings on other threshold objections deferentially is most consistent with the overarching purpose of investment treaties.

Deferential review is also appropriate in light of arbitrators' expertise in international law in general and the resolution of investor-state disputes in particular. Vandevelde 430-431; Dugan 51-52; cf. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985). Arbitrators' expertise typically extends to threshold objections to arbitration. Because the limitations on which such objections would be based are set forth in the investment treaty itself, objections to the tribunal's authority ordinarily involve treaty interpretation—as do the bulk of the merits-related disputes the tribunal must resolve.[6] The international-law and investment expertise that makes arbitrators better positioned than courts to resolve the merits of the parties' dispute can also be applied to resolve threshold objections. Just as courts will set aside or decline to recognize arbitral decisions on the merits only in unusual circumstances, then, absent a contrary indication in the treaty, courts should accord the same deference to

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[6] Objections to arbitration based on noncompliance with conditions on a State's consent are similarly matters of treaty interpretation on which the arbitral tribunal may have some expertise. But because objections based on such conditions challenge the very existence of an arbitration agreement and the sovereign's consent to an adjudicatory tribunal, to defer to arbitrators on such questions would be to assume the existence of the tribunal's authority and fail to accord the requisite respect to the sovereign State on that fundamental issue.

arbitrators' rulings on threshold objections not based on the absence of any arbitration agreement.[7]

C. When A Party Seeks To Set Aside An Arbitral Award Based On An Objection To Arbitration, The Court Should Apply Principles Of Treaty Interpretation To Determine The Appropriate Standard Of Review

1. When a State challenges an arbitral award on the ground that the arbitrator should have concluded that arbitration was not authorized, the court must ascertain the nature of the State's objection in order to determine the proper standard of review. When a State argues to a reviewing court that there is no arbitration agreement between the State and the investor, the court should engage in independent review of that objection. Sometimes the State and the investor may dispute the antecedent question whether the treaty requirement on which the State relies is in fact a condition on the State's consent. Because resolving that dispute is integral to determining whether an arbitration agreement was formed, the court should independently evaluate whether the requirement is a condition on consent, applying principles of treaty interpretation. See, *e.g.*, Dugan 224-225; pp. 16-17, *supra*.

In considering whether a treaty provision is a condition on the State's consent to enter into an arbitration agreement, the court should be cognizant of the fact that investment treaties are structured to provide a State's

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[7] Although some States' domestic law provides for de novo judicial review of all arbitral rulings characterized as "jurisdictional," which may extend beyond objections based on lack of consent, different States may have differing conceptions of what constitutes a "jurisdictional" ruling. 1 Born 981. There is therefore no international consensus on the scope of judicial review of objections to arbitration in the context of awards not arising under the ICSID Arbitration Rules.

standing offer to arbitrate, and so the treaty itself should provide any limitations on the State's consent to form an arbitration agreement. See pp. 20-21, *supra*; *Waste Mgmt.* ¶¶ 13-14, 40 I.L.M. 62-63 (emphasizing NAFTA's use of the phrase "conditions precedent to submission" of a claim to arbitration, and the requirement that arbitration may be instituted "*[o]nly if*" the conditions are fulfilled). Absent a sufficient indication in the treaty's text and, if necessary, other appropriate evidence of the parties' intent, that a particular requirement is a condition precedent to the formation of an investor-state arbitration agreement, noncompliance with that requirement does not prevent the formation of an agreement. See *Mondev Int'l Ltd.* v. *United States*, ICSID Case No. ARB(AF)/99/2, Award on Jurisdiction, ¶ 44 (Oct. 11, 2002), 42 I.L.M. 85, 94 (2003). Courts should not assume that all threshold requirements stated in the treaty presumptively implicate a State's consent, or that the treaty parties intended any particular requirement to be a limitation on consent. Rather, courts should analyze the treaty's text and materials relevant to treaty interpretation to determine whether the States parties intended the requirement to operate as a limitation on consent. See *Saks*, 470 U.S. at 396.

At the same time, courts should be cognizant of the fact that different treaty parties, as sovereigns, may choose to make different requirements conditions on consent—including those that might resemble ones in private commercial agreements that are characterized as "procedural" and presumptively for arbitrators to decide. *Howsam*, 537 U.S. at 84; see pp. 12-14, *supra*; Schreuer 843-849. Courts should therefore conclude that a treaty requirement is a condition on consent if the text and other relevant evidence sufficiently so indicate,

rather than presuming that certain types of treaty preconditions—such as time limits, notice requirements, or waiver of any right to pursue other remedies—are *not* conditions on a State's consent based on the assertedly "procedural" nature of the requirement. Cf. *Howsam*, 537 U.S. at 83; *Hallstrom* v. *Tillamook Cnty.*, 493 U.S. 20, 26-28 (1989) (requirement of pre-enforcement-suit notice to federal agency is a mandatory prerequisite to suit, requiring dismissal if not complied with, that serves important regulatory purposes). Such an approach would risk subjecting a sovereign State to an adjudication to which it never consented and to the liability that might ensue.

2. When a reviewing court concludes that a treaty requirement is a condition on the State's consent to arbitrate, the court, like the arbitral tribunal, must enforce that condition according to its terms to avoid forcing a nonconsenting State to submit to arbitration. If the arbitrator concluded that the investor complied with the condition on consent, the court should independently review that ruling. If the issue implicates factual questions, the court, in exercising its independent judgment, should consider affording respectful consideration to the findings made by an arbitral tribunal in resolving any factual disputes. Cf. *Solvay Pharm., Inc.* v. *Duramed Pharm., Inc.*, 442 F.3d 471, 477 (6th Cir. 2006) (reviewing court's independent consideration may be "informed by the arbitrator's resolution of the arbitrability question").

3. If the court concludes that the requirement on which the State relies is not a condition to its consent, then any noncompliance with that condition did not prevent the formation of an agreement between the disputing parties. Because the arbitrator's ruling on the

objection was made pursuant to an arbitration agreement, the court presumptively should review the arbitrator's ruling on the objection deferentially.

III. THE COURT SHOULD REMAND THIS CASE FOR FURTHER PROCEEDINGS

A. In this case, the court of appeals did not employ the correct analytical framework in considering whether the United Kingdom and Argentina contemplated that an investor could be excused from complying with the Treaty's litigation requirement. The court framed the operative question as whether there was "clear and unmistakable evidence" that the "contracting parties intended the arbitrator to decide" objections based on the litigation requirement. Pet. App. 15a-16a (citing *First Options*, 514 U.S. at 944). The court's holding that de novo review was appropriate was based on its conclusion that because the treaty contemplated litigation in local courts, the treaty parties would have intended a court in the seat of arbitration to independently review compliance with the litigation requirement. *Ibid.* For the reasons stated above, however, the court should have examined as a matter of treaty interpretation whether the litigation requirement was a condition on Argentina's consent to enter into an arbitration agreement, and it should have applied de novo review only if it concluded that the requirement was indeed such a condition. Although the substance of the particular requirement—here, that the investor first seek to resolve the dispute in the host State's courts—may inform that determination, it is not the ultimate focus of the inquiry in its own right.

B. The Court should remand this case to the court of appeals so that it can construe the Treaty in accordance with the proper interpretive framework. That course is

warranted because the parties to this point appear to have assumed that the contract-law framework set forth in *First Options* and *Howsam* should control the arbitrability analysis, and they have accordingly not presented arguments concerning the proper interpretation of the Treaty under governing international-law principles.[8] See, *e.g.*, *AT&T Techs. Inc.*, 475 U.S. at 651-652.

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[8] Petitioner contends (Br. 56-59) that Argentina forfeited the argument that de novo review is warranted. That fact-bound issue is appropriately addressed by the court of appeals on remand. See *Maracich* v. *Spears*, 133 S. Ct. 2191, 2210 (2013). Contrary to petitioner's contention (Br. 59), Argentina's "arguing the arbitrability issue to an arbitrator" does not necessarily indicate intent to have the arbitral tribunal finally resolve the issue. *First Options*, 514 U.S. at 946. Similarly, Argentina's observation that arbitrators generally have "competence to determine their own competence," Pet. Br. 57 (citation omitted), may simply have referred to the international consensus that arbitrators may determine their own jurisdiction in the first instance, subject to varying degrees of judicial review. 1 Born 856, 966-967.

While the thrust of Argentina's arguments before the court of appeals was somewhat unclear, petitioner correctly notes (Br. 58) that Argentina did not expressly argue that de novo review was appropriate, instead contending that the arbitral tribunal had exceeded its powers by failing to enforce the "terms of the arbitration agreement." Resp't C.A. Br. 15 (emphasis omitted). It is unclear, however, whether Argentina conceded the existence of an arbitration agreement, as Argentina sometimes used the phrase "arbitration agreement" to refer to the Treaty. *Id.* at 14. Argentina also argued that the litigation requirement was a "condition on * * * Argentina's consent to arbitration," *id.* at 15, and the court of appeals held that Argentina had not waived the argument that the court had "principal power" to determine the tribunal's authority, Pet. App. 12a-13a. In addition, in its response to petitioner's rehearing petition (at 5-6), Argentina argued that the court of appeals had appropriately engaged in de novo review because petitioner's noncompliance with

On remand, the court of appeals should determine, applying principles of treaty interpretation, whether the litigation requirement is a condition to Argentina's consent to arbitrate, and it should then apply the appropriate standard of review to the arbitral panel's ruling on Argentina's objection to arbitration. See pp. 28-31, *supra*. The United States takes no position on whether this litigation requirement is a condition on consent. Although litigation requirements like that at issue here appear to be uncommon in investment-treaty practice, those tribunals that have interpreted treaties containing similar litigation provisions have divided on the nature of such provisions. Compare, *e.g.*, *Abaclat* v. *Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 571-591 (Aug. 4, 2011) (Argentina-Italy BIT) (litigation requirement concerned whether claim was properly presented to tribunal, and noncompliance was excused on the facts presented), with, *e.g.*, *Daimler Fin. Servs. AG* v. *Argentina*, ICSID Case No. ARB/05/1, Award, ¶ 194 (Aug. 22, 2012) (Argentina-Germany BIT) (litigation requirement "cannot be bypassed"). Ultimately, resolution of the question will depend on the text and structure of the treaty and evidence as to the treaty parties' intent. The court of appeals should address the matter on remand after the parties have had an opportunity to brief it.

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the requirement prevented the formation of an arbitration agreement.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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No. 12-138

IN THE

Supreme Court of the United States

BG GROUP PLC,

Petitioner,

v.

REPUBLIC OF ARGENTINA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* THE AMERICAN ARBITRATION ASSOCIATION IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 12-138

BG GROUP PLC,

Petitioner,

v.

REPUBLIC OF ARGENTINA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* THE AMERICAN ARBITRATION ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The American Arbitration Association ("AAA"), as *amicus curiae*, respectfully submits this brief in support of the Petitioner.[1]

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of the Court.

The AAA is the world's largest provider of alternative dispute resolution services. Since its founding in 1926, the AAA has administered approximately 3.7 million domestic and international disputes. The AAA has signed 70 cooperative agreements with arbitral institutions in 48 countries and has offices throughout the United States, as well as in Singapore, Mexico, and Bahrain. The number of international arbitrations filed with the AAA's international division, the International Centre for Dispute Resolution ("ICDR"), continues to grow.

Because of its extensive experience administering arbitrations, the AAA is well positioned to provide insight into the practical impact of court decisions that have broad-ranging implications for arbitration.

The national policy favoring arbitration embodied in the Federal Arbitration Act ("FAA") and the increased use of arbitration in the United States can be undermined by unwarranted judicial interference, and the AAA counts as a key objective the development of arbitration law that promotes the effective use of arbitration as a means of resolving disputes.

Toward that end, the AAA was at the forefront of organizations recommending that the United States accede to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3, 21 U.S.T. 2517, T.I.A.S. No. 6997 ("New York Convention"). The New York Convention, which was ratified by the United States in 1970, provides among other things for prompt and effective enforcement of voluntary international agreements to arbitrate. At the request of the State Department, the AAA convened a committee of international arbitration experts to draft proposed implementing legislation. The AAA's proposal formed the basis for what is

now Chapter 2 of the United States Arbitration Act, 9 U.S.C. §§ 201-08 (1982). Also at the request of the State Department, the AAA assisted the United Nations Commission on International Trade Law ("UNCITRAL") in developing a draft Model Law on International Commercial Arbitration.

The AAA endeavors through its activities to ensure that the United States remains receptive to arbitration and at the forefront of global developments in arbitration. The AAA, and hence the United States, is believed to have the world's largest annual international arbitration caseload. That caseload, however, is sensitive to judicial attitudes to arbitration, attitudes reflected in U.S. judicial decisions that are keenly studied by the global arbitration community. Where those decisions deviate from international arbitral norms supportive of arbitration, the United States' reputation as a venue with a legal framework that is supportive of arbitration can be seriously diminished.

In addition, the AAA seeks to ensure that parties who provide that disputes shall be resolved under the rules of the AAA can do so with the expectation that those rules will be enforced in a predictable manner. The AAA is concerned that the D.C. Circuit's decision will limit the effectiveness of provisions of the UNCITRAL Arbitration Rules, whose text mirrors that of certain core AAA arbitration rules, by inviting increased judicial involvement in numerous arbitrations.

The AAA has filed *amicus curiae* briefs in many of the major arbitration cases decided by the Supreme Court of the United States. The AAA does so again here, as this case involves issues of great concern to the development of arbitration law in the United States, the confidence that courts will interpret and enforce the AAA's arbitration rules in a predictable manner, and the future of the United States as a place of arbitration.

INTRODUCTION AND SUMMARY

As this Court acknowledged in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), the FAA establishes an "emphatic federal policy in favor of arbitral dispute resolution," which "applies with special force in the field of international commerce." A key factor in giving effect to this federal policy is limiting judicial intervention into the arbitral process. In arbitration, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.* at 628.

In an AAA study of over 250 corporate legal departments, 73% of respondents stated that one of their reasons for using arbitration was that arbitration "saves time," and 71% responded that arbitration "saves money." *See* AM. ARB. ASS'N, DISPUTE-WISE BUSINESS MANAGEMENT: IMPROVING ECONOMIC AND NON-ECONOMIC OUTCOMES IN MANAGING BUSINESS CONFLICTS 25 (2006).[2] These cost and efficiency benefits of arbitration are undermined by judicial intrusion

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[2] *Available at* www.adr.org/aaa/ShowPDF?doc=ADRSTG_004326.

into the arbitral process that goes beyond the type of limited court review provided for by the FAA.

The D.C. Circuit's decision to vacate the arbitral award rendered by three eminent international arbitrators under the Bilateral Investment Treaty signed by the United Kingdom and Argentina (the "BIT")[3] represents a dramatic and unprecedented instance of such judicial intrusion. In conflict with the precedent of this Court and other circuits, and despite the express provisions of the governing rules to submit questions of arbitrability to the arbitrators, the D.C. Circuit disregarded the thorough analysis and findings of the arbitrators regarding the satisfaction of a condition precedent to arbitration (the 18-month local litigation requirement in Article 8 of the BIT). *See* Pet. App. 161a-171a.

An affirmance by this Court of the D.C. Circuit's decision would have negative implications for the practice of arbitration in the United States in three ways.

First, the D.C. Circuit's decision to scrutinize compliance with a condition precedent to arbitration introduces wide-ranging opportunities for delay and increased arbitration-related litigation, because clauses requiring disputing parties to submit to dispute resolution processes such as negotiation or mediation before resorting to arbitration are so prevalent in practice.

Second, the D.C. Circuit's decision imposes a novel temporal limitation on common agreements to arbitrate questions of arbitrability found in many arbitration rules, including the rules of the AAA and the

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[3] Agreement for the Promotion and Protection of Investments, Arg.-U.K., Dec. 11, 1990, 1765 U.N.T.S. 33.

ICDR. This new limitation has the potential to affect adversely the many parties who have come to rely on such rules to empower arbitrators to determine issues of arbitrability.

Third, the D.C. Circuit's decision, based entirely on domestic law considerations, to vacate an arbitral award rendered under an investment treaty between two foreign sovereigns with no regard for the detailed international law findings of three eminent arbitrators jeopardizes the standing of the United States as a leading center for international arbitration. The D.C. Circuit's decision has already drawn sharp criticism, and an affirmance would likely have a negative impact on the willingness of foreign parties to arbitrate in the United States.

For these reasons, the judgment below should be reversed.

ARGUMENT

I. The D.C. Circuit's Decision Invites Inefficiencies in the Arbitral Process through Increased Judicial Intervention

The D.C. Circuit, in direct conflict with the decisions of this Court and other circuit courts, held that satisfaction of a condition precedent to arbitration, in the form of the 18-month local litigation requirement in the BIT, is a "question of arbitrability" to be decided by the courts. Pet. App. 13a.

In *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964) and *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), this Court held that the fulfillment of conditions precedent to arbitration is not an issue of "substantive arbitrability" for the courts to determine, but a procedural question (an issue of "procedural

arbitrability") for the arbitrators to decide. In the wake of *Howsam*, courts have uniformly held that the satisfaction of mandatory contractual dispute resolution steps prior to arbitration, such as negotiation, mediation or third-party review of claims, is a procedural question for the arbitrator to decide.[4]

Arbitration parties and arbitration practitioners now rely on the principle embodied in *John Wiley* and confirmed in *Howsam* as a bright-line rule. The rule has been so widely accepted that the Revised Uniform Arbitration Act ("RUAA"), which to date has been adopted by 17 states and the District of Columbia, incorporates clear direction on the allocation of decision-making responsibilities between courts and arbitrators. Under the RUAA, the arbitrators, not the courts, "shall decide whether a condition precedent to arbitrability has been fulfilled." *See* Revised Unif. Arbitration Act of 2000 § 6(c), 7 U.L.A. 13 (Supp. 2002).[5]

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[4] *See, e.g.*, *Dialysis Access Ctr., LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 375 (1st Cir. 2011) ("[T]he determination as to whether RMS complied with the Arbitration Clause's supposed 'good faith negotiations' pre-condition to arbitration is an issue presumptively for the arbitrator to decide . . . ."); *Lumbermens Mut. Cas. Co. v. Broadspire Mgmt. Servs., Inc.*, 623 F.3d 476, 481 (7th Cir. 2010) (Compliance with pre-arbitration notice and negotiation provisions was "a procedural question . . . for the arbitrator to address."); *Int'l Bhd. of Elec. Workers, Local Union No. 124 v. Smart Cabling Solutions, Inc.*, 476 F.3d 527, 530 (8th Cir. 2007) (determining that the "bona fide[s]" of pre-arbitral negotiations was a condition precedent and thus "a matter for the arbitrator to decide") (internal citations omitted); *El Dorado Sch. Dist. No. 15 v. Cont'l Cas. Co.*, 247 F.3d 843, 846 (8th Cir. 2001) (Compliance with a precondition to arbitration is "a question of procedural . . . arbitrability . . . 'that . . . should be left to the arbitrator to decide.'") (internal citation omitted).

[5] The official comments to the RUAA further explain that "[s]ubsections (b) and (c) of Section 6 are intended to incorporate

This clear allocation of responsibilities between courts and arbitrators has served to preserve key benefits of arbitration. "A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'" *Preston v. Ferrer*, 552 U.S. 346, 357 (2008). In *John Wiley*, material to this Court's decision to leave to the arbitrators questions of compliance with pre-arbitration dispute resolution steps was the concern that opening the door to litigation over such issues would result in "opportunities for deliberate delay and the possibility of well-intentioned but no less serious delay. . . ." *John Wiley*, 376 U.S. at 558. *Howsam* likewise stated a concern to establish a rule suitable "better to secure a fair and expeditious resolution of the underlying controversy. . . ." *Howsam*, 537 U.S. at 82.

The D.C. Circuit's decision blurs the bright-line rule. While *John Wiley* should have been controlling, the D.C. Circuit limited the scope of that decision, holding that it reflected merely "the policy behind federal labor law." Pet. App. 17a. Reading *Howsam* as warranting a case-specific factual inquiry into the nature of the condition precedent at issue, the D.C. Circuit concluded that "[w]here the contracting parties agree to require dispute resolution in a court prior to arbitration, ... a fundamentally different question of arbitrability

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the holdings of the vast majority of state courts and the law that has developed under the FAA that . . . whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." Revised Unif. Arbitration Act (2000) (U.L.A.) § 6 cmt. n.2 at 26.

arises than that of the ignored informal resolution steps in *John Wiley*." Pet. App. 19a.[6]

The D.C. Circuit's decision to depart from the bright-line rule in *John Wiley* and *Howsam* offers a precedent for parties to delay and disrupt ongoing arbitrations by seeking review in court of compliance with conditions precedent or, worse, to challenge final and binding awards on the sole basis that the arbitrator was not the proper decision-maker to decide whether a condition precedent was satisfied or excused.

The D.C. Circuit's decision is bound to have widespread ramifications for the practice of arbitration, because "tiered" or "stepped" dispute resolution clauses requiring resort to other forms of dispute resolution, such as negotiation or mediation, before arbitration are increasingly prevalent and encouraged in commercial contracts. For the purpose of this proceeding, the AAA has conducted a survey of 663 dispute resolution clauses submitted in connection with international arbitrations filed with the AAA and its international division, the ICDR, between July 1, 2012 and June 30, 2013. A condition precedent to arbitration was included in over a third—34%—of the dispute resolution

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[6] It is anticipated that Argentina will argue, as it did at the *certiorari* stage, that the D.C. Circuit's decision did not implicate a condition precedent (and the precedent of this Court regarding the same) because no agreement to arbitrate was ever formed. The argument is unpersuasive because the D.C. Circuit itself framed the issue as one of who—the courts or the arbitrators—is best suited to decide compliance with a condition precedent ("precondition") to arbitration and took pains to distinguish *John Wiley* on its facts. In any event, Argentina had offered a standing agreement to arbitrate in the BIT, which BG later accepted in writing.

clauses that were studied. The breakdown in the types of conditions precedent was as follows:

Type of Condition Precedent	Number of Clauses	% of Total
Negotiation	73	33%
Mediation	47	21%
Executive/Representative Meeting	28	12.5%
Executive/Representative Meeting & Negotiation	24	11%
Negotiation & Mediation	23	10%
Other Combinations of Executive Meeting, Negotiation, Mediation & Other Forms of ADR	28	12.5%
Total	**223**	**100%**

These empirical findings are consistent with the reported experience of practitioners that tiered dispute resolution clauses are increasingly common in practice.[7] They are also confirmed by surveys of arbitration users.

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[7] *See, e.g.*, INT'L BAR ASS'N, IBA GUIDELINES FOR DRAFTING INTERNATIONAL ARBITRATION CLAUSES 30 (2010) ("It is common for dispute resolution clauses in international contracts to provide for negotiation, mediation or some other form of alternative dispute resolution as preliminary steps before arbitration."); JAN PAULSSON *ET AL.*, THE FRESHFIELDS GUIDE TO ARBITRATION AND ADR 114 (2d ed. 1999) ("It is increasingly common, especially in contracts involving long term projects or commercial relationships, for parties to agree upon varying forms of staged or intermediate dispute resolution procedures, such as expert adjudications or decisions by review boards, which must be followed prior to the commencement of arbitration proceedings.").

According to a 2011 survey conducted by Fulbright & Jaworski LLP, approximately 51% of the U.S. companies and 60% of the U.K. companies surveyed had resolved disputes through contractually agreed staged processes involving negotiation, mediation and arbitration.[8] A 2006 survey of corporate arbitration users conducted by PriceWaterhouseCoopers concluded that "[m]ulti-tiered or escalating dispute resolution clauses are increasingly popular."[9]

Such tiered dispute resolution clauses are found not only in commercial contracts, but also in virtually all bilateral investment treaties,[10] including those entered into by the United States.[11]

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[8] FULBRIGHT & JAWORSKI LLP, SECOND ANNUAL LITIGATION TRENDS SURVEY FINDINGS 4 (2011), *available at* www.adr.org/aaa/ShowPDF?doc=ADRSTG_004354.

[9] PRICEWATERHOUSECOOPERS, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 2006 11 (2006), *available at* www.pwc.be/en_BE/be/publications/ ia-study-pwc-06.pdf.

[10] *See, e.g.*, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments, June 11, 1975, 1032 U.N.T.S. 32, art. 8(1) (requiring, as a precondition to arbitration, that the parties engage in a three-month settlement period "through pursuit of local remedies, through conciliation or otherwise"). *See generally* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 247 (2008) ("Nearly all consent clauses in treaties provide for certain procedures that must be adhered to. A common condition for the institution of arbitration proceedings is that an amicable settlement has been attempted through consultations or negotiations. This requirement is subject to certain time limits ranging from three to twelve months. If no settlement is reached within that period, the claimant may proceed to arbitration.").

[11] *See, e.g.*, 2012 U.S. Model Bilateral Investment Treaty, arts 23-24, *available at* http://www.ustr.gov/sites/default/files/BIT%

The matter under review involved an agreement to submit a dispute to *judicial* determination prior to arbitration. Such a condition precedent to arbitration is unlikely to be found in commercial agreements, and none of the 663 dispute resolution clauses surveyed by the AAA and ICDR contained such a condition precedent. However, despite these unusual circumstances, the decision below has material consequences for conditions precedent to arbitration generally. The D.C. Circuit's decision to ignore the bright-line rule, its suggestion that *John Wiley* is somehow limited to the labor context, and its reading of *Howsam* as warranting a case-specific factual inquiry into the nature of the condition precedent at issue, all invite litigation over compliance with conditions precedent, with its attendant "opportunities for deliberate delay and the possibility of well intentioned but no less serious delay...." *John Wiley*, 376 U.S. at 558.

The door opened by the D.C. Circuit's decision for parties to delay or otherwise disrupt—whether deliberately or in good faith—the many arbitral proceedings that involve tiered or staged dispute resolution clauses is an outcome that is especially unfortunate, because the principal reason that tiered dispute resolution clauses have become popular among arbitration users is that these clauses have been successful in reducing the costs and delays of resolving disputes by promoting early resolution. *See, e.g.*, FULBRIGHT & JAWORSKI LLP, SECOND ANNUAL LITIGATION TRENDS SURVEY FINDINGS 4 (2011) (showing that the experience of most surveyed companies, including 94% of the

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20text%20for%20ACIEP%20Meeting.pdf (providing for an escalated investor-state dispute resolution process, including consultations, a three-month notification period, and a six month cooling-off period).

largest companies, was that such staged processes reduced costs).[12]

An affirmance by this Court of the D.C. Circuit's judgment would herald an unwelcome expansion of the bases on which a party is permitted to litigate whether it should arbitrate. Because of the prevalence of tiered dispute resolution clauses, such expansion threatens the efficacy of arbitration and could increase the burden on the U.S. judiciary.

II. The D.C. Circuit's Ruling that Arbitral Rules Do Not Apply until Conditions Precedent Have Been Satisfied Creates Uncertainty for Arbitration Users

Even if this case presented a question of "substantive arbitrability," which it does not, the D.C. Circuit should have left that question to the arbitrators because the agreed arbitral rules—the UNCITRAL Arbitration Rules—explicitly empowered the arbitrators to decide such questions.

In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), this Court held that courts must defer to an arbitrator's arbitrability decision where there is "clear and unmistakable" evidence of the parties' intention to submit such matters to the arbitrator. *Id.* at 944 (internal quotations omitted). The BIT's incorporation of the UNCITRAL Rules satisfied the *First Options* test. Article 21(1) of the UNCITRAL Rules contains a broad and standard agreement to arbitrate questions of arbitrability: "The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to

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[12] *Available at* www.adr.org/aaa/ShowPDF?doc=ADRSTG_004354.

the existence or validity of the arbitration clause or of the separate arbitration agreement." UNCITRAL Arbitration Rules (1976), art. 21(1), G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976).[13]

The intent and purpose of Article 21(1) of the UNCITRAL Rules are precisely to delegate arbitrability questions, including questions regarding the existence and validity of an arbitration agreement, to the arbitrators. This rule (which embodies the principle known in international practice as *Kompetenz-Kompetenz*) is "critical to the efficient conduct of the arbitration" because "without it a party could stall the arbitration at any time merely by raising a jurisdictional objection that could then only be resolved in possibly lengthy court proceedings." DAVID D. CARON & LEE M. CAPLAN, THE UNCITRAL ARBITRATION RULES: A COMMENTARY (2d ed. 2013) 450-451 (discussing Article 23(1) of the 2010 UNCITRAL Rules).

Consistent with the intent and purpose of the UNCITRAL Rules, the Second and Ninth Circuits have held that Article 21(1) constitutes, for the purposes of *First Options*, "clear and unmistakable" evidence of the parties' intent to empower the arbitrators to decide questions of arbitrability. *See Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 395 (2d Cir. 2011) (ruling that because the relevant BIT "incorporated by reference the UNCITRAL rule delegating questions of arbitrability to the arbitral panel . . . Ecuador cannot now 'disown its agreed-to obligation to arbitrate . . . the question[s] of arbitrability'"); *Schneider*

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[13] While the UNCITRAL Rules were revised in 2010, they continue to provide arbitrators with the power to rule on their own jurisdiction. However, the present dispute arose and is governed by the 1976 UNCITRAL Rules.

v. Kingdom of Thailand, 688 F.3d 68, 73-74 (2d Cir. 2012) (holding that the parties' "adoption of the UNCITRAL rules . . . is clear and unmistakable evidence of their intent to arbitrate issues of arbitrability"); *Oracle America, Inc. v. Myriad Group, A.G.*, No. 11-17186, 2013 WL 3839668, at *7 (9th Cir. July 26, 2013) (holding that "incorporation of the [UNCITRAL] arbitration rules into an arbitration provision in a commercial contract constitutes clear and unmistakable evidence that the parties to the contract intended to delegate questions of arbitrability to the arbitrator").[14]

The D.C. Circuit accepted that "the Treaty's incorporation of the UNCITRAL Rules provides 'clear[] and unmistakabl[e] evidence' that the parties intended for the arbitrator to decide questions of arbitrability." Pet. App. 14a (citing *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011)). The D.C. Circuit nonetheless declined to give effect to the parties' agreement on the basis that "the [UNCITRAL] Rules are not triggered until after an investor has first, pursuant to Article 8(1) and (2) [of the BIT], sought recourse, for eighteen months, in a court of the

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[14] *See also Thai-Lao Lignite Co. Ltd. v. Gov't of the Lao People's Democratic Republic*, 492 Fed. App'x 150, 151 (2d Cir. 2012) ("The [Agreement] specifically provides that any arbitration will be governed by UNCITRAL Rules . . . . There is no question, then, that the arbitral panel was free to decide the scope of its own jurisdiction . . . ."); *Wal-Mart Stores, Inc. v. PT Multipolar Corp.*, Nos. 98-16952, 98-17384, 1999 WL 1079625, at *2 (9th Cir. Nov. 30, 1999) (holding that because the parties incorporated the UNCITRAL Rules into their agreements, the "arbitrator, rather than the district court, should decide whether the parties' disputes are arbitrable").

contracting party where the investment was made." Pet. App. 14a.

This novel "temporal limitation" on the reach and effectiveness of Article 21(1) defeats the intent and purpose of that provision, *i.e.*, to ensure the efficient conduct of the arbitration as a cost- and time-effective alternative to litigation. As the AAA's survey of dispute resolution clauses shows, conditions precedent to arbitration are common in practice, and a similar temporal argument could be made with respect to virtually any type of condition precedent. Consequently, the D.C. Circuit's decision creates opportunities for parties to use court intervention to delay or even derail arbitral proceedings, the very outcome that the drafters of Article 21(1) sought to prevent.

The implications of the D.C. Circuit's decision for the practice of arbitration extend to both domestic and international arbitrations administered by the AAA and the ICDR. Article 21(1) of the UNCITRAL Rules served as the basis for Rule 7(a) of the AAA Commercial Arbitration Rules[15] and Article 15(1) of the ICDR International Dispute Resolution Procedures.[16] Circuit courts have noted the similarity between the AAA and ICDR Rules and Article 21(1) of the UNCITRAL Rules. *See, e.g.*, *Oracle America, Inc., v. Myriad Group A.G.*, 2013 WL 3839668 at *4 (9th Cir. July 26, 2013) (noting that "the AAA rules contain a jurisdictional provision

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[15] Rule 7(a) provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."

[16] Article 15(1) provides that "[t]he tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."

similar to Article 21(1) of the 1976 UNCITRAL Rules and almost identical to Article 23(1) of the 2010 UNCITRAL Rules.").

Circuit courts have overwhelmingly held that the AAA and ICDR provisions empower arbitrators, and not courts, to decide issues of arbitrability. *See, e.g.*, *Contec Corp. v. Remote Solution Co., Ltd.*, 398 F.3d 205, 208-11 (2d Cir. 2005) (holding that the incorporation of the AAA Commercial Arbitration Rules was "clear and unmistakable evidence" of the parties' intent to delegate the question of arbitrability to the arbitrator).[17] In doing so, these courts have upheld the intent of the AAA and of the many parties that incorporate its rules in their contracts. It was precisely to make the parties' intent unmistakable, and with this Court's decision in *First Options* in mind, that the AAA amended its Commercial Arbitration Rules in 1999 to include what is currently Rule 7(a). *See* Am. Arb. Ass'n, *Commentary on the Revisions to the Commercial Arbitration Rules of the American Arbitration Association*, 3 ADR CURRENTS 6, 7 (Dec. 1998) (explaining that then Rule R-8(a) was adopted in the wake of *First Options* to "make more explicit" the parties' agreement to arbitrate issues of arbitrability).

The decision below creates uncertainty for the thousands of arbitration users who incorporate the AAA

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[17] *See also Petrofac, Inc. v. DynMcDermott Petrol. Ops. Co.*, No. 11-20141, 2012 U.S. App. LEXIS 14610 (5th Cir. July 17, 2012); *Green v. Supershuttle Int'l, Inc.*, 653 F.3d 766 (8th Cir. 2011); *Fadal Machining Ctrs., LLC, v. Compumachine, Inc.*, 461 Fed. App'x 630 (9th Cir. 2011); *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7 (1st Cir. 2009); *Fallo v. High-Tech Inst.*, 559 F.3d 874 (8th Cir. 2009): *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327 (11th Cir. 2005).

and ICDR rules into their contracts each year, trusting that such incorporation reserves the determination of arbitrability issues to the arbitrators. *See* ICDR, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES: INCLUDING MEDIATION AND ARBITRATION RULES 9 (2009) (assuring potential arbitration users that "[b]y providing for arbitration under these [ICDR] Rules, parties can avoid the uncertainty of having to petition a local court to resolve procedural impasses").

An affirmance by this Court of the D.C. Circuit's judgment would cast doubt over the reach and effectiveness of agreed arbitral rules, in disregard of the intent of the parties who incorporate them into their contracts.

III. The D.C. Circuit's Decision Puts the United States at Odds with the International Arbitration Community and Threatens its Standing as a Seat for International Arbitration

The United States is one of the preferred seats for international arbitration, along with jurisdictions such as England, France, Switzerland, Japan and Singapore. QUEEN MARY UNIV. OF LONDON, 2010 INTERNATIONAL ARBITRATION SURVEY: CHOICES IN INTERNATIONAL ARBITRATION 19 (2010).[18]

In most cases, the seat of an international arbitration is a matter of choice for the parties. Surveys of arbitration users show that parties pay most attention to the legal framework offered by potential seats of arbitration. QUEEN MARY UNIV. OF LONDON, 2010 INTERNATIONAL ARBITRATION SURVEY: CHOICES IN

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[18] *Available at* www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf.

INTERNATIONAL ARBITRATION 17 (2010) (identifying the "formal legal infrastructure" as the most important factor in choosing the seat of arbitration for 62% of survey respondents).

A key factor that parties and their counsel consider in determining the desirability of a location as a seat of arbitration is the attitude of the local judiciary towards arbitration and the risk of judicial interference in the arbitral process. *See, e.g.*, GARY BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 64 (3d ed. 2010) ("Nations with interventionist or unreliable local courts should always be avoided as arbitral seats."); JAN PAULSSON, ET AL., THE FRESHFIELDS GUIDE TO ARBITRATION CLAUSES IN INTERNATIONAL CONTRACTS 32 (3d ed. 2010) ("Legal systems allowing extensive judicial interference with arbitral awards should be avoided.").

In keeping with the stated preference of arbitration users, jurisdictions intent on promoting their standing as a seat of international arbitration emphasize the non-interventionist attitude of their judiciary. A prime example is France, which recently enacted a new arbitration law extending the traditional non-interventionist policy of its judiciary. *See* Marie Bellan, *Arbitrage: Paris veut conserver son leadership* [Arbitration: Paris wants to maintain its leadership], LES ÉCHOS, June 14, 2011, at 5 (referring to the new law as "reinforcing the non-interventionist philosophy of the state judge" and quoting the French Minister of Justice as commenting that "Paris is the premier place in the world for arbitration and I wish it to remain so; since our law is so well recognized, it is the responsibility of the public authorities to ensure that it continues to thrive").

Singapore likewise advertises its "unequivocal judicial policy of facilitating and promoting arbitration." *See* Kasiviswanathan Shanmugam, Minister for Law and Second Minister for Home Affairs, Address at the Inaugural Singapore International Arbitration Forum (Jan. 21. 2010).[19] In an effort to attract foreign arbitration users, Bahrain went so far as to allow parties to exclude court intervention altogether. John M. Townsend, *The New Bahrain Arbitration Law and the Bahrain "Free Arbitration Zone"*, 65 DISP. RES. J. 74 (Feb. – Apr. 2010). In this respect, it followed in the steps of Switzerland, whose arbitration law likewise allows foreign parties to an arbitration seated in Switzerland to exclude recourse to the Swiss courts. Swiss Fed. Code on Private Int'l L., Art. 192.

By contrast, and as explained above, the D.C. Circuit's judgment invites increased judicial intervention in the arbitral process. It also demonstrates disregard for the findings of three arbitrators eminently qualified to interpret the BIT in accordance with international law. The president of the arbitral tribunal, Guillermo Aguilar-Alvarez, teaches international investment law at Yale Law School. He served as Principal Legal Counsel to the Government of Mexico for the negotiation and implementation of the North American Free Trade Agreement and free trade agreements with Costa Rica, Bolivia, Colombia, and Venezuela. He has also acted as counsel or arbitrator in numerous cases involving investment treaty interpretation.[20] His co-arbitrators were likewise recognized experts in the field. Professor Albert Jan van

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[19] *Available at* www.news.gov.sg/public/sgpc/en/media_releases/agencies/minlaw/speech/S-20100121-2.html.

[20] Mr. Aguilar-Alvarez has also published and spoken on investment arbitration, and on the relationship between courts and

den Berg teaches international law and arbitration law at Erasmus University in Rotterdam and at the University of Miami Law School. He has arbitrated numerous disputes involving the interpretation of investment treaties and other international law issues, and is a recognized authority on the interpretation of the 1958 New York Convention.[21] Professor Alejandro M. Garro teaches international commercial law, comparative law, and Latin American legal systems at Columbia Law School and is Senior Research Scholar, Parker School of Foreign and Comparative Law, Columbia University. He has acted as arbitrator in investment treaty arbitrations and is a recognized

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tribunals. *See, e.g.*, Guillermo Aguilar-Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365 (2003). Mr. Aguilar-Alvarez is also a member of the AAA's Board of Directors. He has not been consulted or in any manner involved in the drafting of this Brief, nor was he made part of the deliberations regarding the AAA's determination to file this Brief.

[21] This Court itself has cited Professor van den Berg's work to aid its interpretation of the Convention. *See Mitsubishi Motors*, 473 U.S. at 639 n. 21. Professor van den Berg is also the general editor of the *Yearbook: Commercial Arbitration* – which since 1976 has provided annual updates on key developments in international arbitration, including important awards, court decisions on arbitration from around the world, updates on developments in arbitration law and practice, and a digest of investment treaty awards and decisions – as well as the International Council for Commercial Arbitration Conference Series, which has published articles on a broad range of topics, including investor-state arbitration. Professor van den Berg is a former President (2003-2010) and Secretary-General (1980-1988) of the Netherlands Arbitration Institute, a former Vice-President of the London Court of International Arbitration (LCIA) (1998-2002), and a current arbitrator on the Arbitral Tribunal Concerning the Bank for International Settlements.

expert on the interpretation of the Vienna Convention on Contracts for the International Sale of Goods.[22]

In finding that there was but "one possible outcome to the [arbitrability] question" before it and that BG was required to litigate first in the Argentine courts (Pet. App. 19), the D.C. Circuit made no mention of the governing principles of international law under the BIT and failed to engage with the arbitrators' detailed finding—articulated in a 139-page award after over 4 years of pleadings and a full hearing—that these international treaty law principles compelled the opposite conclusion. The United States itself conceded at the *certiorari* stage that "[t]o be sure, the court of appeals' interpretation of the Treaty [was] not free of doubt" in this respect. Br. For U.S. As Amicus 13.

An affirmance by this Court would not only blur the bright-line rule established in *John Wiley* and reaffirmed in *Howsam* (as explained *supra* in Section I), and undermine the effectiveness of the UNCITRAL and other agreed arbitral rules (as explained *supra* in Section II), but it would also send a negative signal about the attitude of the U.S. judiciary towards arbitration. This signal would be all the more resounding as this case, which has already attracted significant attention abroad, is but the second reported instance of a domestic court anywhere setting aside an investment treaty award.

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[22] Professor Garro, in addition to his academic appointments and his experience as an arbitrator, has acted as a consultant for the World Bank on arbitration and has studied and published articles about the jurisdiction of arbitral tribunals. *See, e.g.* Alejandro M. Garro, *Enforcement of Arbitration Agreements & Jurisdiction of Arbitral Tribunals in Latin America*, 1 J. INT'L ARB. 293 (1984).

The aftermath of the other reported instance of a national court vacating an investment treaty award—*United Mexican States v. Metalclad Corp.*, 2001 B.C.S.C 664 (May 2, 2001)—is a reminder that vacatur decisions have real-world consequences that extend well beyond the particular case at hand. The Canadian court's decision to vacate in part an award rendered against Mexico under the North American Free Trade Agreement not only drew sharp criticism from commentators,[23] but also had a demonstrable impact on the willingness of parties to select Canada as a seat of international arbitration. In the wake of *Metalclad*, parties to international arbitral proceedings,[24] including the United States,[25] have pointed to

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[23] *See, e.g.*, William Dodge, *Mexico v. Metalclad Corporation, 2001 B.C.S.C. 664 (Case Comment)*, 95 AM. J. INT'L L. 910, 916 (2001) ("[T]he case may lead one to wonder whether it is appropriate to allow national courts to review Chapter 11 awards."); Todd Weiler, *Metalclad v. Mexico: A Play in Three Parts*, 9 CTRE. OF ENERGY, PETROLEUM AND MIN. L. AND POL'Y INTERNET J. (2003) (criticizing the British Columbia judge for "decid[ing] that he knew better than an expert tribunal what the 'usual and ordinary meaning' of 'international law' must be" and "stepp[ing] beyond the bounds of his legislative mandate."); David Williams, *Challenging Investment Treaty Arbitration Awards—Issues Concerning the Forum Arising from the Metalclad Case*, 2003 BUS. L. INT'L 156, 166 ("*Metalclad* may be presented as an example of why it is inappropriate for a national court to enter upon matters of international law when reviewing an international arbitral decision.").

[24] *See, e.g.*, *United Parcel Servs. v. Canada*, NAFTA (UNCITRAL), Order on the Place of Arbitration, ¶ 8 (Oct. 17, 2001), *available at* www.naftalaw.org/disputes_canada_ ups.htm; *Merrill & Ring Forestry L.P. v. Canada*, NAFTA (UNCITRAL), Decision of the Tribunal on the Place of Arbitration, ¶ 22 (Dec. 13, 2007), *available at* www.naftalaw.org/disputes_canada_ merrill&ring.htm.

[25] *See, e.g.*, *Canfor Corp. v. United States*, NAFTA (UNCITRAL), Decision on the Place of Arbitration, Filing of a

that decision and the arguments advanced by the Canadian government in those proceedings as reasons to resist the selection of Canada as seat of arbitration.

The observation made by Argentina and the United States at the *certiorari* stage that some foreign courts review questions of jurisdiction *de novo* begs the question: is the fulfillment of conditions precedent to arbitration properly characterized as a question of "jurisdiction"? Consistent with the approach of this Court in *Howsam*, the favored view in international practice is that the fulfillment of conditions precedent to arbitration should be regarded not as a question of "jurisdiction," subject to review by the controlling court, but as a question of "admissibility" for the arbitrators to decide. *See, e.g.*, J. Paulsson, *Jurisdiction and Admissibility*, in G. Aksen et al. (Eds.), REFLECTION ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION 603, 614-15 (2005) (endorsing the *John Wiley* and *Howsam* approach); GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 845-47 (2009) (concluding, on the basis of reported cases, that courts in other jurisdictions would likely adopt the *Howsam* approach and leave to the arbitrators the issue of whether preconditions to arbitration are satisfied); *Nihon Plast v. Takata*, Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Mar. 4, 2004, REVUE DE L'ARBITRAGE 2005, 143 (Fr.) (holding that preconditions to an arbitration clause relate to admissibility, not jurisdiction, and are thus outside the scope of art. 1502 of the New French Civil Procedure Code setting forth grounds for annulment). The U.K. Supreme Court's decision that both Argentina and the

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Statement of Defence and Bifurcation of the Proceedings, ¶ 24 (Jan. 23, 2004), *available at* www.naftalaw.org/disputes_us_canfor.htm.

United States referenced, *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Gov't of Pakistan*, does not detract from that conclusion. The case involved the altogether different question of whether an arbitral tribunal could assert jurisdiction over a non-signatory to an arbitration agreement. [2010] UKSC 46.

The concerns highlighted in the present brief are not academic. The D.C. Circuit's decision has been unanimously condemned by international arbitration users, including some of the most experienced practitioners, who often decide where to seat arbitration proceedings. For example, the decision has been described as a "threat . . . to treaty and commercial arbitration in the United States,"[26] as a precedent that "may significantly affect Washington, D.C.'s standing as a seat of international arbitration,"[27] and as a case "show[ing] that DC may not be optimal as a seat for investor-state disputes from the perspective of investors."[28]

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[26] Paula Hodges, Laurence Shore & Peter Godwin, *Cert. Petition in the BG v. Argentina Case: No Support from the US Solicitor General*, H.S.F. ARBITRATION NOTES (May 17, 2013), *available at* www.hsf-arbitrationnotes.com/2013/05/17/cert-petition-in-the-bg-v-argentina-case-no-support-from-the-us-solicitor-general.

[27] Carolyn B. Lamm & Eckhard R. Hellbeck, *US Court of Appeals Vacates BG Group's Investment Treaty Award Against Argentina for Failure to Litigate in Argentine Court for 18 Months Before Commencing Arbitration*, 15 INT'L ARB. L. REV. N-14, N-18 (2012).

[28] Timothy Nelson & Julie Bedard, *United States: Nixing a Final Award on Jurisdictional Grounds*, GLOBAL ARB. REV. (Jun. 10, 2013), *available at* www.globalarbitrationreview.com/journal/article/31607/united-states-nixing-final-award-jurisdictional-grounds. *See also* Asari A. Aniagolu et al, *US Supreme Court 2013*

In sum, an affirmance by this Court of the D.C. Circuit's judgment is likely to have a negative impact on the willingness of foreign parties to arbitrate in the United States, and thus to threaten the standing of the United States as a leading seat of international arbitration.

Term – Some Key Arbitration Rulings and Decisions, LEXOLOGY (Jul. 10, 2013) (observing that "[d]epending on which way the Court goes, parties seeking to give more autonomy to arbitration panels may find the United States more hospitable or dramatically less so, as an arbitration forum"), *available at* www.lexology.com/library/detail.aspx?g=ae8258a8-61fc-496b-98f9-e1ca52b5f534; Keith Goldberg, *Justices May Shift US Courts' Role in Global Arbitration*, NETWORK FOR JUSTICE IN GLOBAL INVESTMENT (Jun. 11, 2013) (commenting that "[f]aced with the possibility of meddling by U.S. courts, parties may steer clear of the U.S. when they look to settle arbitration disputes"), *available at* www.justinvestment.org/2013/06/justices-may-shift-us-courts-role-in-global-arbitration; Sebastian Perry, *BG Group v Argentina – a Dallah for the US?*, GLOBAL ARB. REV. (Jan. 27, 2012) ("Gary Born . . . says the court's 'interpretation of the scope of the arbitral tribunal's competence is out of line with most international authority and a dangerous precedent for both investment and commercial arbitration.'"), *available at* www.globalarbitrationreview.com/news/article/30124/bg-group-vargentina-8211-dallah-us/.

CONCLUSION

For the foregoing reasons, *Amicus* AAA respectfully requests that this Court reverse the judgment below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-138

IN THE

Supreme Court of the United States

BG GROUP, PLC,

Petitioner,

v.

REPUBLIC OF ARGENTINA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICI CURIAE* PRACTITIONERS AND PROFESSORS OF INTERNATIONAL ARBITRATION LAW IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici are practitioners and professors of law engaged in the field of international arbitration.[1] They are identified in Appendix A.

The interest of *Amici* in connection with this case is to assist the Court in deciding the issue before it in a manner that upholds and is consistent with well-established principles of international arbitration. *Amici* agree with the result reached by the Court of Appeals—that the arbitrators' decision regarding their jurisdiction to hear and decide the underlying dispute in this case is subject to *de novo* review by the court—and strongly disagree with the contrary views expressed by the petitioner and its *amici*, which reflect a fundamental misunderstanding of the proper allocation of jurisdictional power between arbitrators and courts. *Amici* on this brief believe it is important for the Court to be aware of their considered analysis and views on the important issue before the Court: whether a challenge to an arbitration tribunal's assertion of jurisdiction is reviewable independently by a court.

SUMMARY OF THE ARGUMENT

1. The BIT is an international treaty and thus, under the Vienna Convention, must be construed in accordance with the plain meaning of its words. The BIT is an

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this brief. The parties have consented to this filing.

agreement between two sovereign nations (Argentina and the United Kingdom). It is not an agreement between the parties to the arbitration in this case (Argentina and BG Group PLC ["BG Group"]). The BIT therefore is not, and does not contain, an agreement by Argentina to arbitrate disputes with potential investors. It contains an *offer* to arbitrate such disputes, which can be accepted by an investor only upon its compliance with the terms of the offer. Such terms include the requirement that the investor first seek redress in an Argentine court. Because BG Group did not fulfill that requirement, Argentina did not consent to arbitrate BG Group's claims. Absent such consent, the arbitrators lacked jurisdiction to hear or decide the case, as the Court of Appeals correctly held.

The provision in the BIT that a dispute shall first be submitted to an Argentine court constitutes a choice of *forum*. It therefore entails issues of Argentina's *consent* to arbitrate absent the required initial resort to the court—*i.e.*, issues of *substantive* jurisdiction—which are for a court, not arbitrators, to decide. Because the provision at issue is forum-related, it is fundamentally different from *procedural* pre-conditions in an agreement to arbitrate that are not forum-related, such as statutes of limitation. For example, a time limitation would bar parties from seeking relief, after the expiration of the time period, in any forum, court or arbitration tribunal. By contrast, a provision requiring resort to a court is jurisdictional.

2. Under the well-established principle of international arbitration known as "competence-competence"—which is incorporated into the UNCITRAL arbitration rules, the UNCITRAL model law on international arbitration, and the laws of countries that frequently serve as the seat of international arbitrations (including the United Kingdom, a signatory to the BIT)—the arbitrators had

jurisdiction to decide *in the first instance* whether they had jurisdiction to hear and decide the case. However, it is equally well-established that the arbitrators' jurisdictional decision was subject to *de novo* review by the court (except in exceptional cases such as proceedings under the 1965 Washington Convention governing ICSID arbitrations, *see* Resp. Br. at 8 n.1). If a court determines, as the Court of Appeals did in this case, that the arbitrators lacked jurisdiction, their award, having been rendered in the absence of power to do so, must be vacated.

3. When an arbitration tribunal's jurisdiction to hear and decide a case depends on whether a party has agreed to arbitrate, United States law, consistent with international law, holds that the arbitrators' jurisdictional ruling is subject to *de novo* review by the court, as the Court of Appeals held in this case. This Court has consistently so held.

ARGUMENT

I. Under the BIT's Unambiguous Terms, Argentina Did Not Consent to Arbitrate BG Group's Disputes

The only source of BG Group's claim to a right to arbitrate its dispute with Argentina is a bilateral investment treaty ("BIT") between Argentina and the United Kingdom. Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, 1765 U.N.T.S. 33 (the "Treaty").

An international treaty must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of

its object and purposes." Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 ("Vienna Convention"), art. 31.1. The parties and other *amici* agree that the Treaty in this case must be so interpreted. *See, e.g.*, Pet. Br. at 8 ("The primary international law principles governing treaty interpretation are codified in the Vienna Convention"); Resp. Br. at 44-45 (to the same effect); U.S. Br. at 17 (quoting art. 31.1).

The first step in analyzing the Treaty is to recognize that it is an agreement between two sovereign nations (Argentina and the United Kingdom), not between Argentina and any potential investor (such as BG Group) that might invoke the Treaty's protections. Therefore, as commentators and the United States Solicitor General agree, when a BIT contains dispute resolution provisions that include the possibility of arbitration with an investor, such provisions do not constitute a nation's agreement to arbitrate, but rather an *offer* to arbitrate, which can give rise to an agreement only if an investor accepts the terms of the offer. U.S. Br. at 16, citing Jeswald W. Salacuse, *The Law Of Investment Treaties* 381 (2010); Christopher F. Dugan et al., *Investor-State Arbitration* 222 (2008); Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* 437 (2010).

The terms of the offer to arbitrate disputes with investors contained in the Treaty are unambiguous. The first clause in the article concerning the resolution of disputes between an investor and a host state, article 8(1), states that disputes "between an investor [BG Group] of one Contracting Party [United Kingdom] and the other Contracting Party [Argentina] . . . *shall* be submitted, at the request of one of the Parties to the dispute, to the

decision of the competent tribunal of the Contracting Party in whose territory the investment was made." Pet. Br. App. 8a-9a (emphasis added).[2] In this case, that would be an Argentine court. The Treaty then states two "cases" in which the dispute shall be submitted to arbitration. Art. 8(2), Pet. App. 9a. Only the first such case is relevant in this appeal (the second one being agreement of the Contracting Party and the investor to submit the dispute to arbitration, which did not occur). The first case is triggered in any of two "circumstances": (i) if 18 months have elapsed *after the dispute was submitted to the Argentine court* without that court having given a final decision, or (ii) the court has given its final decision "but the Parties are still in dispute." *Id.*

As is clear from the ordinary meaning of the words used in the Treaty, the submission of the dispute to the Argentine court under article 8(1) is a mandatory requirement, in the absence of which neither of the circumstances stated in article 8(2)(a) of the Treaty could arise. Because, as stated, the Treaty constitutes an *offer* to arbitrate on the terms stated in the Treaty, the investor's failure to submit the dispute to the Argentine court was not a valid acceptance of the offer, and thus, no agreement to arbitrate disputes between Argentina and BG Group ever came into existence.[3]

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2. The text of the Treaty is included as an appendix to Petitioner's brief, pp. 1a to 15a. We refer to that appendix as "Pet. Br. App. ___." We refer to Petitioner's separate appendix containing the decisions below as "Pet. App. ___."

3. Article 9 of the Treaty, which concerns disputes between the contracting parties (*i.e.*, Argentina and the United Kingdom), further confirms this interpretation of article 8. Article 9 contains

BG Group and its *amici* argue that the requirement in the BIT to first litigate in an Argentine court is materially identical to certain procedural pre-conditions to arbitration, which, certain circuit courts have held, present questions of procedural jurisdiction for the arbitrators to decide. *E.g.*, Pet. Br. at 36-37; *Amicus* Br. of American Arbitration Association ("AAA") at 7 and n.4, citing *Dialysis Access Center, LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 383 (1st Cir. 2011); *Lumbermens Mut. Cas. Co. v. Broadspite Mgmt. Servs., Inc.*, 623 F.3d 476, 481 (7th Cir. 2010); *Int'l Brotherhood of Elec. Workers v. Hope Elec. Corp.*, 380 F.3d 1084, 1099 (8th Cir. 2007); and *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 391-93 (6th Cir. 2008). This argument is unpersuasive for several reasons.

First, the BIT provision in this case requires initial resort to a *court*, and thus constitutes a choice of *forum*. A requirement that a claimant first seek redress in court cannot be construed as a procedural condition that arbitrators can decide with finality. Such a requirement raises a serious issue as to whether the party against which arbitration was commenced consented to arbitrate that

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no requirement of resort to a local court; rather, it provides that, if the parties cannot resolve their dispute "through the diplomatic channel," then the dispute "shall upon the request of either Contracting Party be submitted to an arbitral tribunal." Pet. Br. App. 11a. Thus, article 9 constitutes an *agreement* to arbitrate, whereas article 8 constitutes an *offer* to do so upon fulfillment of specified terms. As the Court of Appeals noted (Pet. App. 14a), the contracting parties knew how to express an *agreement* to arbitrate when they wished to do so (in article 9); therefore, their decision to limit resort to arbitration in article 8 was intentional and should be given effect.

dispute at all, and thus presents an issue of substantive arbitrability that a court may and must decide *de novo* (*see* Point III). Such a requirement thus is materially different from procedural conditions, *e.g.*, requiring the passage of time (a "cooling-off period"), negotiation, or mediation, compliance with which is not designated to a specific forum to decide. None of the pre-conditions in the cases on which petitioner and its *amici* rely concerned a requirement to litigate in *court* rather than, or prior to, arbitration, or involved a challenge to the very existence of an agreement to arbitrate. Here the requirement is a limitation *ratione materiae*, *i.e.*, on the arbitrators' subject-matter jurisdiction, and not a procedural condition to recourse to arbitration.

Second, the provision at issue is contained in a treaty between two sovereign nations, not between the parties to the dispute. As a result, the provision is deemed to constitute an *offer* to arbitrate on the terms stated in the treaty, not an agreement to arbitrate in the absence of compliance with such terms, as discussed above. Moreover, article 8(2) defines the types of disputes that the sovereign states consent to arbitrate: those which were not finally resolved within eighteen months by the competent tribunal of the Contracting Party or which still exist when a final decision of that tribunal has been made.

Third, and consistent with the preceding point, all three sovereign parties to the North American Free Trade Agreement ("NAFTA"), Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993)—the United States, Canada and Mexico—have taken the position that, unless a claimant investor complies with certain pre-arbitration requirements set forth in Article 1121 of that treaty,

no agreement to arbitrate arises with respect to the respondent State.[4] *See, e.g.*, *Tembec Inc. v. United States*, Objection to Jurisdiction of Respondent United States of America, at 35-38, UNCITRAL (Feb. 4, 2005), and *Methanex Corp. v. United States*, Memorial on Jurisdiction and Admissibility of Respondent United States of America, at 70-78, UNCITRAL (Nov. 13, 2000) (stating United States position); *Mondev Int'l Ltd. v. United States*, Case No. ARB(AF)/99/2, Rejoinder on Competence and Liability of Respondent United States of America, at 61-62, ICSID (Oct. 1, 2001) (stating Canada's and Mexico's position).

If the NAFTA requirements, which do not require prior resort to a *court*, are nevertheless deemed by all three sovereign states as precluding their consent to arbitrate if those requirements are not met, even more so should the provision in the Argentina-UK BIT—which expressly requires resort to a court—be construed as precluding Argentina's consent to arbitrate if that requirement is not met. The D.C. Circuit correctly held that, absent compliance with that requirement, Argentina did not consent to arbitrate. Pet. App. 19a-20a.

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4. NAFTA Article 1121 provides in substance that a claimant must deliver to the disputing party and include in the arbitration claim a written consent to arbitration in accordance with the terms of the treaty and a written waiver of the right to initiate or continue any other dispute resolution proceeding in any other forum except for a proceeding for injunctive or other extraordinary relief.

II. The Principle of "Competence-Competence" Allows Arbitrators To Decide Their Jurisdiction in the First Instance, But Their Decision Is Subject to Judicial Review

The principle of competence-competence, as generally understood, is that an arbitral tribunal has the authority to determine its own jurisdiction. *See, e.g.*, George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 Yale J. of Int'l Law 1, 14 (2012) (hereinafter, "Bermann"). That principle is incorporated into the Arbitration Rules of the United Nations Commission on International Trade Law (the "UNCITRAL Rules"). The Treaty in this case provides that, if a party to the dispute properly refers a matter to arbitration and the parties do not agree on the procedures to be followed within three months thereafter, then the arbitration shall be conducted under the UNCITRAL Rules then in force.[5] Treaty art. 8(3), Pet. Br. App. 9a-10a. Article 21.1 of those rules states in relevant part: "The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement."

Under international law, the purpose of this provision, and of similar provisions in the rules of other international

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5. The UNCITRAL Arbitration Rules adopted in 1976 were in force at the time BG Group sought arbitration in 2003 (those rules are available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html) (last visited Oct. 24, 2013). The UNCITRAL Arbitration Rules were amended in 2010. The 2010 amendments did not substantively change the jurisdictional provision cited in the text (which is found in article 23.1 of the 2010 rules). In this brief we refer to the 1976 version of the UNCITRAL Rules, unless otherwise indicated.

arbitration bodies, is to allow the arbitration to proceed, even in the face of a party's challenge to the arbitral tribunal's jurisdiction, without being interrupted, at the "gateway" or initial stage of the arbitration, by the party's application to a court to determine the jurisdictional issue. *See, e.g.*, Bermann at 13-14. That purpose was served in this case. Argentina challenged the arbitrators' jurisdiction to hear and decide the case on the ground that, as discussed in Point I above, Argentina never consented to arbitrate the dispute with BG Group. Consistent with the principle of competence-competence, Argentina did not seek a court's ruling on the jurisdictional issue at that initial stage of the arbitration; the tribunal decided that it did have jurisdiction and proceeded to hear and decide the case on the merits.

But, the issue of the arbitrators' jurisdiction does not end there. A party that unsuccessfully challenged the arbitrators' jurisdiction before the arbitrators has an absolute right to raise that challenge in court following the issuance of the arbitrators' award, and the court has both the power and the obligation to review that challenge *de novo*. This principle is embodied in the laws of nations in which international arbitrations are frequently held (including France, England, Germany, and Sweden), as well as in the UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006) (the "Model Law"). The Model Law is a model code that "reflects a worldwide consensus on the principles and important issues of international arbitration practice." Model Law, Explanatory Note ¶ 2. Legislation based on the Model Law has been adopted by 66 countries and eight states in the United States.[6]

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6. The full text of the Model Law, the Explanatory Notes thereon by the United Nations Secretariat, and the countries

Under the Model Law, "[t]he competence of the arbitral tribunal to rule on its own jurisdiction (i.e. on the foundation, content and extent of its mandate and power) is, of course, subject to court control." UNCITRAL Model Law, Explanatory Note ¶ 26. *See also* UNCITRAL Model Law art. 34(2)(a)(i) (a party may challenge an arbitration award on the ground that there was no valid agreement to arbitrate); Jan Paulsson, Nigel Rawding , et al. (eds.), *The Freshfields Guide to Arbitration Clauses in International Contracts, Third* 37 (Kluwer Law International 2010) (under the UNCITRAL Model Law, the court's role includes "deciding upon any challenge to the jurisdiction of the tribunal").

As one well-known treatise states, "the 'competence-competence' rule, whereby the courts cannot rule on the arbitrators' jurisdiction until the arbitrators themselves have had the opportunity to do so, can only exist because the courts are able to review the arbitrators' jurisdiction once the award has been made." Emmanuel Gaillard and John Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶ 1558, at 884 (Kluwer Law International 1999). *See also* Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* 443, ¶ 7.12 (Oxford Univ. Press 2009) ("it is recognized in the Model Law (and in most, if not all, national systems of law) that whilst any challenge to the jurisdiction of an arbitral tribunal may be dealt with *initially* by the tribunal itself, the final decision on jurisdiction rests with the relevant national court") (italics in original).

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and states that have enacted legislation based on it, are available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (last visited Oct. 24, 2013).

BG Group's *amici* warn that the Court of Appeals' decision to review the arbitrators' jurisdictional ruling "is out of line with most international authority and a dangerous precedent for both investment and commercial arbitration," *Amicus* Br. of U.S. Council for Int'l Business at 25, and that the decision threatens the United States' standing as a seat for international arbitration, *Amicus* Br. of AAA at 18. One such *amicus* cites France as a "prime example" of a nation that promotes its standing as a seat for international arbitration through "the non-interventionist attitude" of its courts. *Id.* at 19.

These warnings are without any substance, because the review function performed by the Court of Appeals in this case was not only consistent with, but also required by, the courts of the supposedly most arbitration-friendly nations. As the Third Circuit stated in *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 289 (3d Cir. 2003), "international law overwhelmingly favors some form of judicial review of an arbitral tribunal's decision that it has jurisdiction over a dispute." This is certainly the case in France, for example, supposedly the "prime-example" of an arbitration-friendly nation:

> If a party seeks to have the award annulled in a French court following an arbitration, it may raise each and every possible challenge to the existence and enforceability of the arbitration agreement. Moreover, it can expect the court to address those challenges without any deference to jurisdictional findings the arbitral tribunal may have previously made. Although French law postpones full judicial inquiry into arbitral jurisdiction until after an award has

> been issued, it obviously is not indifferent to the principle of consent or to the legitimacy concerns that underlie it.

Bermann at 19.[7] *See also* Guido Carducci, *The Arbitration Reform in France: Domestic and International Arbitration Law*, 28 Arbitration Int'l 125, 153-54 (2012) (under the most recent reform of the French arbitration law, enacted in 2011, one of the exclusive grounds on which a party may seek to vacate an arbitration award, unless both parties have expressly waived such a challenge, is that "the arbitral tribunal incorrectly declared that it had or lacked jurisdiction over the case").

English courts also so hold with respect to arbitrations held in England. *E.g.*, *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Gov't of Pakistan*, [2010] UKSC 46, [12], [30-31] (appeal taken from Eng.) (English courts independently decide whether agreement to arbitrate exists, without deference to arbitrators' prior ruling); *see also* Johan Steyn, *England's Response to the UNCITRAL Model Law of Arbitration*, 10 Arb. Int'l 1, 5 (1994) ("Arbitrators are entitled, and indeed required, to consider whether they will assume jurisdiction. But that decision does not alter the legal rights of the parties, and the court has the last word.");

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7. Thus, Professor Bermann, co-counsel for and one of the constituent members of the "professors and practitioners" who filed an *amicus* brief in support of reversal, supports the main thrust of this *amicus* brief in support of affirmance, namely, that an arbitral tribunal's ruling on a party's claim that it did not consent to arbitrate is subject to *de novo* review ("without any deference" to the arbitrators' decision) in the courts of the nation in which the arbitration took place.

and Resp. Br. at 24-25 (citing *Dallah* and noting that it is consistent with prior English court decisions).

Just this week, the Court of Appeal of Singapore reaffirmed and followed this principle, vacating an arbitration award as to certain parties who had not agreed to arbitrate. *PT First Media TBK v. Astro Nustantara Int'l BV, et al.*, [2013] SGCA 57, [162-164]. The court stated that *Dallah* "represents the leading statement on the standard of curial review to be applied under the New York Convention," *id.* at [163]. It therefore affirmed "the exercise of *de novo* judicial review" by Singapore courts and stated that "the tribunal's own view of its jurisdiction has no legal or evidential value before a court that has to determine that question." *Id.* The court concluded that it was "entitled, indeed obliged, to undertake a fresh examination" of the objection to the arbitrators' jurisdiction. *Id.* at [164].

In Germany, where the doctrine is known as "kompetenz-kompetenz," Bermann at 14 n.44, legislation provides that parties may not agree in advance "to assign final decision on the validity or enforceability of the arbitration agreement to the arbitrators," *id.* at 21, thus making clear that a court must have the final say on that issue.

In Sweden, legislation provides that, although arbitrators may initially rule on their own jurisdiction to decide the dispute, such a determination is subject to court review. Section 2 of the Swedish Arbitration Act (SFS 1999:116) states in relevant part: [8]

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8. The English translation of this act is available at http://www.sccinstitute.com/?id=23746 (last visited Oct. 30, 2013)

> Arbitrators may rule on their own jurisdiction to decide the dispute. The aforesaid shall not prevent a court from determining such a question at the request of a party. The arbitrators may continue the arbitral proceedings pending the determination by the court.
>
> Notwithstanding the fact that the arbitrators have determined, in a decision rendered during the proceedings, that they have jurisdiction to resolve the dispute, such decision is not binding.

In sum, under the competence-competence doctrine as embodied in the UNCITRAL Rules and Model Law, and widely followed by nations that promote the resolution of disputes via arbitration, arbitrators have jurisdiction to make an *initial* ruling on their own jurisdiction and to proceed with the arbitration on the merits; but, once the arbitrators have issued a final award, the competence-competence principle does not restrict a court's authority to review *de novo* the arbitrators' jurisdictional ruling.

III. The Court of Appeals' Decision Is Consistent with this Court's Prior Decisions that Courts, Not Arbitrators, Ultimately Decide Whether the Parties Agreed to Arbitrate

The Court of Appeals' holding that the BIT provision requiring an investor to first seek redress in a local court presented an issue of substantive arbitrability for the court, not the arbitrators, to ultimately decide is entirely consistent with this Court's jurisprudence.

As the Court has consistently stated, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). *See also First Options of Chicago v. Kaplan*, 514 U.S. 938, 943 (1995) ("arbitration is simply a matter of contract between the parties").

Which forum—court or arbitration tribunal—ultimately decides whether a party has agreed to arbitrate a dispute, *i.e.*, whether the arbitrators have jurisdiction to decide that issue? The answer turns on whether the parties agreed "to submit the arbitrability question itself to arbitration." *First Options*, 514 U.S. at 943. In deciding this question, courts "should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* at 944 (quoting *AT & T Technologies, supra*, at 649) (brackets in original). The Court reaffirmed this rule in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) ("the 'question of arbitrability, is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise") (quoting *AT & T Technologies*, 475 U.S. at 643).

In *Howsam*, the Court refined this principle, applying presumptions as to the parties' likely intent to have a court or the arbitrators decide the issue of arbitrability. In the "narrow circumstances where contracting parties would likely have expected a court to have decided the gateway matter [of arbitrability]," *id.* at 83, the issue is one of "substantive arbitrability" for the courts to decide, *id.* at

85 (quoting Revised Uniform Arbitration Act of 2000, § 6, comment 2, 7 U.L.A., at 13). By contrast, "procedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide." *Id.* at 84 (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964) (internal quotations omitted, italics in original)). Such procedural issues include "allegation[s] of waiver, delay, or a like defense to arbitrability." *Howsam* at 84 (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (brackets in original)).

The D.C. Circuit followed the above principles in deciding, correctly, that Argentina's challenge to the arbitrators' jurisdiction presented a question of *substantive* arbitrability for the courts to decide. The circuit court stated that the BIT "provides a prime example of a situation where the 'parties would likely have expected a court' to decide arbitrability." Pet. App. 15a (quoting *Howsam* at 83). As that court further stated, "[i]t would be odd to assume that where the gateway provision *itself* is resort to a court, the parties would have been surprised to have a court, and not an arbitrator, decide whether the gateway provision should be followed." Pet. App. 15a (italics in original).

Additional factors support the D.C. Circuit's conclusion that the arbitrability issue in this case is substantive rather than procedural. First, the requirement to initially seek redress in the host nation's court is independent from, and not intertwined with, the merits of the dispute. Pet App. 17a-18a and n.6; *cf. Howsam* at 85 (issue of timeliness of claim arose under an NASD rule, which the parties reasonably would expect NASD arbitrators, rather

than a court, to construe). Second, the issue in this case arises under a treaty between sovereign nations, not an agreement between the parties to the arbitration; thus, no agreement to arbitrate at all came into being in the absence of the required initial resort to the local court. *See* Point I above. Third, this case involves a dispute between a foreign sovereign state and a foreign entity, to which international arbitration norms should apply, and does not entail United States policy considerations favoring arbitral dispute resolution either generally, *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), or in the context of a federal statute such as the Labor Management Relations Act, 29 U.S.C. § 151 *et seq.*, as in *John Wiley*, *supra*.

Finally, there is no clear and unmistakable evidence in the BIT or elsewhere, as required by *First Options* and *Howsam*, that the parties agreed to submit the arbitrability question to the arbitrators. Neither the BIT nor the principle of competence-competence, which speaks only to the arbitrators' authority to make a first and not a final determination as to their jurisdiction, provides such evidence. Further, that the BIT contemplated arbitration under the UNCITRAL Rules under certain circumstances does not constitute clear and unmistakable evidence, in any event. As discussed above, even if the UNCITRAL Rules had been properly triggered, they do not constitute clear and unmistakable evidence that the parties to the BIT intended arbitrators to decide the arbitrability issue (*see* Point II above). The competence-competence principle, which those rules incorporate, presumes ultimate court control; it does not do away with it. The defense in this case involves a *forum*-based challenge to the arbitrators' jurisdiction, which goes to the heart of whether a party

consented to arbitrate and thus is fundamentally different from the waiver and estoppel defenses at issue in the cases on which BG Group and its *amici* rely (as discussed in Point I above).

The current draft of the Restatement (Third) of the U.S. Law of International Commercial Arbitration, Tentative Draft No. 2 (April 16, 2012) ("Restatement"), confirms that U.S. courts review arbitrators' jurisdictional rulings *de novo* when the existence of an agreement to arbitrate is at issue, as in this case. It provides that "a court reviews de novo (1) the existence of the arbitration agreement." Restatement § 4-12(d). In the comment to that section, the Restatement further clarifies that, "[w]hen the existence of the arbitration agreement is at issue, the parties cannot avoid court review by clearly and unmistakably submitting the question to arbitration in their original arbitration agreement, but instead may only submit the issue to the tribunal by a separate and subsequent agreement (including a post-dispute agreement)." *Id.*, Comment *d.* Thus, under the Restatement, the fact that the Treaty contemplates arbitration under the UNCITRAL Rules does not defeat Argentina's right to *de novo* court review of the arbitrators' ruling as to whether an arbitration agreement ever came into existence.

Accordingly, the D.C. Circuit properly followed this Court's precedents in holding that the question of Argentina's consent to arbitrate was for the courts to decide; and it also properly concluded that Argentina did not consent to arbitrate in this case given BG Group's failure to first seek redress in the Argentine court.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX — *AMICI CURIAE* PRACTITIONERS AND PROFESSORS OF INTERNATIONAL ARBITRATION LAW

Amici Curiae Practitioners and Professors of International Arbitration Law[1]

Michael M. Collins SC is an Irish barrister who was been a Senior Counsel since 1994. He is also admitted to the Bars of England & Wales, New York and the U.S. Supreme Court. He practices from 4 Arran Square in Dublin and Monckton Chambers, London in the fields of commercial law, European Union law and arbitration and appears regularly before the High Court and Supreme Court of Ireland and the Court of Justice of the European Union. He is a graduate of University College Dublin with Master's degrees in both economics and law and a graduate of the University of Pennsylvania with a Master's degree in law. He has extensive experience of arbitration both as counsel and arbitrator including international commercial arbitration. He is one of Ireland's representatives on the ICC Commission on Arbitration, a member of the International Centre for Dispute Resolution Panel of Arbitrators, former President of Arbitration Ireland and the External Examiner in Arbitration to the Honourable Society of King's Inns, Dublin of which he is a Bencher. He is a Fellow and Director of the International Academy of Trial Lawyers in the United States and is a former Chairman of the Bar Council of Ireland. He is currently Adjunct Professor of Law at University College Dublin Law School. A fuller biographical summary of Mr. Collins

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1. The affiliations of *amici* are shown for identification purposes only. They have joined in and submit this brief as individuals.

appears at http://www.monckton.com/barrister/35/michael-collins-sc (last visited Oct. 30, 2013).

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Appendix

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AMICUS CURIAE BRIEF

No. 12-138

Supreme Court, U.S.
FILED
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RECO
AND
BRIEFS

IN THE
Supreme Court of the United States

BG GROUP PLC,

Petitioner,

v.

THE REPUBLIC OF ARGENTINA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* PROFESSORS AND PRACTITIONERS OF ARBITRATION LAW IN SUPPORT OF REVERSAL

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INTEREST OF *AMICI CURIAE*

Amici are professors of law and lawyers engaged in the field of international arbitration.[1] Their work (as counsel, arbitrators, or scholarly commentators) includes the arbitration of investment disputes under the provisions of a bilateral or multilateral investment treaty.[2]

The primary interest of *amici* is in the orderly operation of a system of international dispute resolution that has become an important component of international relations. *Amici* believe that the decision of the United States Court of Appeals for the District of Columbia Circuit carries with it a risk of disruption of the established system for resolving threshold issues in investment treaty arbitration. By imposing United States contract and arbitration law, rather than international law, on the construction of a treaty between two sovereign states, the Court of Appeals put the United States

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1. The parties have consented to the filing of this brief. Pursuant to Rule 37(6), counsel for *amici* certify that no party or counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

2. Amici are identified in Appendix A. The affiliations of amici are shown for identification only; amici have joined together as individuals to file this brief.

courts on the wrong course for considering awards entered in investment treaty arbitrations. The undersigned *amici curiae* urge the Court to assure that such awards are treated with the respect that sovereign states signing investment treaties have a right to expect.

SUMMARY OF ARGUMENT

The fundamental problem with the Court of Appeals' decision is that it disregards an international arbitral tribunal's interpretation of the bilateral investment treaty between the United Kingdom and the Republic of Argentina under the rules of international law chosen by those states. Instead, the Court of Appeals substituted a parochial interpretation of the treaty derived from case law construing commercial contracts under the Federal Arbitration Act. The parties to that treaty intended and expected the entirety of that instrument, including the investor-state arbitration clause, to be interpreted and applied by an international arbitral tribunal in accordance with international law.

The Court of Appeals' misreading of the intent of the sovereign parties as to whether courts or arbitrators should play the primary role in interpreting and applying the provisions of their investment treaty not only threatens to undermine the effectiveness of the system of investment treaty arbitration, which depends on appropriate judicial deference to arbitral decisions under those treaties, but also threatens the balance defined by this Court for reviewing commercial arbitration awards. The District Court properly deferred to the arbitral tribunal's interpretation and application of the treaty, conducting only a limited review of the arbitral panel's decision.

United States arbitration law would benefit if the Court were to take this opportunity to confirm that international arbitrators' determinations of threshold objections in investment treaty arbitrations are entitled to deference from the courts when the sovereign parties have expressed in a treaty their intention for arbitrators to decide such questions.

INVESTOR-STATE ARBITRATION

Bilateral investment treaties ("BITs") have become a core component of the system of international law underpinning the flow of private investments from one country into another. Sovereigns rely on these treaties to encourage foreign investment, while investors rely on them to obtain legal protections for their investments.

Today, there are nearly 3,000 BITs in effect between pairs of sovereign nations; the United States is a party to no fewer than forty-six.[3] Many multilateral treaties among nations in a particular region (such as the North American Free Trade Agreement, or NAFTA) or among nations concerned about a particular resource (such as the Energy

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3. *See* Country-Specific Lists of Bilateral Investment Treatiess, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/Country-specific-Lists-of-BITs.aspx (last visited August 26, 2013).

Charter Treaty, or ECT) contain similar provisions for the protection of investments. In addition, a worldwide regime for the resolution of investment disputes is embodied in the Washington Convention, which created the International Centre for Settlement of Investment Disputes.[4]

The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments ("the BIT" or "the Treaty") is an example of a BIT.[5] BITs normally identify the protections that an investor based in one sovereign party to the BIT may expect for investments made in the territory of the other sovereign party. BITs typically protect against expropriation of

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4. An arbitration award made under the Washington Convention is not subject to review by the courts. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, articles 53-54 Mar. 18, 1965, 17 U.S.T. 1270, T575 U.N.T.S. 159 ("Washington Convention"); 22 U.S.C. § 1650a (2012). The arbitration award underlying this action is subject to the New York Convention, rather than the Washington Convention. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(e), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 ("New York Convention"); 9 U.S.C. § 201.

5. Agreement for Promotion and Protection of Investments, U.K.–Arg., Dec. 11, 1990, U.K. Treaty Series No. 41 (1993). The English language text of the Treaty is attached to the Petitioner's brief as an Appendix.

investments (Article 5 of the Treaty), while giving assurances to investors and their investments of fair and equitable treatment (Article 2), treatment no less favorable than that accorded to nationals of the host state ("national treatment") (Article 3), and treatment no less favorable than that accorded to nationals of third countries ("most-favored-nation treatment") (Article 3).

The characteristic mechanism through which BITs provide redress to aggrieved investors is international arbitration. BITs commonly require that an investor provide notice to the host state and wait a specified period of time before commencing an arbitration. Other conditions and preconditions may be specified. But the feature that makes these treaties so essential an element of the international economic system is their guarantee that an investor may assert a claim directly against the foreign sovereign that, in the investor's view, has denied the investor (or its investment) certain protections promised by the treaty.

The right to resort to arbitration relieves investors of the need to persuade their own governments to espouse their claims through diplomatic channels, and relieves states of the complications to diplomatic relations that arise from the espousal of private claims. It also relieves investors of any concern that the courts of host countries will be unable or unwilling to provide justice in a dispute between a foreigner and their own government. By depoliticizing investment

disputes and providing aggrieved investors a neutral forum composed of experts in international investment law in which to bring claims directly against a foreign state, investment treaties have ushered in a new era of investor protection.

Arbitration under an international investment treaty differs in many important respects from arbitration under a commercial contract. One such difference involves how the parties' consent to arbitration is expressed. In commercial arbitration, consent to arbitration is usually expressed in a clause of a contract between the parties to the dispute.

In investor-state arbitration, consent to arbitration is generally not bilateral. Rather, the consent of the state party to the arbitration is often expressed in a BIT. In a typical BIT, each state party to the BIT makes a standing offer to arbitrate disputes with investors from the other state party. As the Second Circuit explained, investors express their acceptance of that standing offer by initiating arbitration:

> In effect, Ecuador's accession to the Treaty constitutes a standing offer to arbitrate disputes covered by the Treaty; a foreign investor's written demand for arbitration completes the

"agreement in writing" to submit the dispute to arbitration.[6]

Some BITs contain preconditions that must be satisfied before the investor may initiate arbitration. Arbitral tribunals constituted under BITs closely scrutinize the terms of the applicable BIT to determine the consequences of an investor's failure to satisfy such a condition. The most significant factor on which that scrutiny focuses is the wording of the particular BIT involved. Some tribunals have read BITs to condition the state's consent to arbitration upon the satisfaction of a condition precedent.[7] In contrast, a large number of tribunals have read other BITs to provide that a failure to

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6. *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 392-93 (2d Cir. 2011); *see also* Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. FOREIGN INVESTMENT L.J., 232, 234 (1995).

7. *See, e.g.*, *Daimler Fin. Servs. AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, ¶¶ 174-94 (Aug. 22, 2012) (interpreting the investor-state dispute resolution provisions of the Germany-Argentina BIT to require investors to pursue their claims for 18 months in Argentina's domestic courts as a pre-condition to Argentina's consent to arbitrate because the text of Article 10 of the Germany-Argentina BIT "describes its dispute resolution process in mandatory and necessarily sequential language." The tribunal nevertheless acknowledged that the Claimant would not be required to comply with that mandatory process "if Argentine law permitted no remedy for the Claimant's claims in the domestic courts."). All of the arbitration awards cited in this brief may be found at http://italaw.com/links.htm.

satisfy a condition precedent affects the *admissibility* of the claim, but does not call into question the state's consent to arbitrate disputes with investors.[8] In the language of investment treaty arbitration, an objection to jurisdiction asserts that a particular *tribunal* is not competent to hear the dispute, while an objection to admissibility asserts that a particular *claim* may not be heard by the tribunal.[9]

It is not uncommon – indeed, it verges on the routine – for the sovereign respondent in a BIT arbitration to raise threshold objections to the jurisdiction of a tribunal or to the admissibility of a claim.[10] These objections can range from issues of

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8. *See, e.g., Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 493-496 (Aug. 4, 2011) ("The Tribunal is of the opinion that the negotiation and 18 months litigation requirements relate to the conditions for implementation of Argentina's consent to ICSID jurisdiction and arbitration, and not the fundamental question of whether Argentina consented to ICSID jurisdiction and arbitration. Thus, any non-compliance with such requirements may not lead to a lack of ICSID jurisdiction, and only – if at all – to a lack of admissibility of the claim. . . .").

9. *See* Jan Paulsson, Jurisdiction and Admissibility, in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER (Gerald Aksen et al. eds., 2005).

10. Of 245 investment treaty arbitration awards on public record, 206 have addressed objections either to the admissibility of claims or the jurisdiction of the tribunal.

(Footnote continued on next page)

policy[11] to compliance with technical treaty requirements concerning the definition of an investment,[12] the nationality of an investor,[13] or satisfaction of conditions precedent to arbitration.[14]

Amici do not, in this brief, seek to posit any general rule on how conditions to arbitration should be applied. Rather, they urge the Court to recognize that the sovereign parties to BITs typically expect,

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See Newly Posted Awards, Decisions, and Materials, INVESTMENT TREATY ARBITRATION, http://italaw.com/links.htm (last visited Aug. 26, 2013); INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, http://icsid.worldbank.org (last visited Aug. 26, 2013). Many BIT arbitrations never become public.

11. *E.g.*, *Methanex Corp. v. United States*, Partial Award, ¶¶ 103-05 (Aug. 7, 2002) (environmental legislation).

12. *E.g.*, *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. AA280, Award, ¶¶ 97-111 (Nov. 26, 2009).

13. *E.g.*, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award, ¶¶ 25-46 (July 7, 2004).

14. *E.g.*, *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, ¶¶ 12-21 (Oct. 24, 2011). The Solicitor General's brief in opposition to certiorari cites two instances of the United States raising objections to the jurisdiction of arbitral tribunals appointed under the NAFTA on the grounds that there was no agreement to arbitrate because the claimant had failed to satisfy the conditions precedent to arbitration. Brief for the United States as *Amicus Curiae*, at 21-22.

and provide in the text of the BIT for, such objections to be ruled upon by arbitral tribunals having expertise in international law. Arbitrators appointed to resolve these cases are accustomed to analyzing threshold objections and to assessing their validity under the law applicable to the treaty. In doing so, they generally give primacy to the text of the particular BIT before them, as interpreted in accordance with the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (the "Vienna Convention").[15]

As this case illustrates, awards entered in BIT arbitrations are being presented to United States courts for review or enforcement.[16] This case

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15. The United States has not ratified the Vienna Convention, but "it has recognized since at least 1971 that the Convention is the 'authoritative guide' to treaty law and practice." *Ecuador v. United States*, PCA Case No. 2012-5, United States' Memorial on Objections to Jurisdiction, at 16 n.47 (Apr. 25, 2012) (citing Letter of Submittal from Secretary of State Rogers to President Nixon transmitting the Vienna Convention on the Law of Treaties, Oct. 18, 1971, S. Ex. L. 92d Cong., 1st Sess., *reprinted in* 65 DEP'T ST. BULL. No. 1694, Dec. 13, 1971, at 684, 685).

16. *E.g.*, *Blue Ridge Invs. L.L.C. v. Republic of Argentina*, No. 12-4139-cv, 2013 U.S. App. LEXIS 17160 (2d Cir. Aug. 19, 2013); *Schneider v. Kingdom of Thailand*, 688 F.3d 68 (2d Cir. 2012); *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011); *Chevron Corp. v. Republic of Ecuador*, No. 12-1247 (JEB), 2013 U.S. Dist. LEXIS 79535 (D.D.C. June 6, 2013); *Funnekotter v. Republic of Zimbabwe*, No. 09-8168, 2011 WL 666227 (S.D.N.Y. Feb. 10, 2011); *Waguih Elie George SIAG and Clorinda Vecchi v. Arab Republic of*

(Footnote continued on next page)

provides the Court the opportunity to define the level of respect owed by United States courts to arbitral awards emerging from this internationally accepted system for the resolution of foreign investment disputes.

ARGUMENT

I. ARBITRAL TRIBUNALS, NOT COURTS, SHOULD RESOLVE THRESHOLD ISSUES IN ARBITRATIONS UNDER INVESTMENT TREATIES

The Court of Appeals concluded that the sovereign parties to the Treaty – the United Kingdom and Argentina – intended and expected that a United States court would determine *de novo* threshold questions under the investor-state arbitration provisions of the Treaty, rather than defer to the determination of such questions by arbitrators. That conclusion was not merely a misreading of the Treaty, but also is likely to set United States courts on a collision course with the international regime embodied in thousands of BITs. This Court can avert that collision by making it clear that international arbitral tribunals' interpretations

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Egypt, No. M–82, 2009 WL 1834562 (S.D.N.Y. June 19, 2009).

of international investment treaties are entitled to deference from the courts.

A. THE DISTRICT COURT PROPERLY FOUND THAT THE PARTIES TO THE BIT INTENDED ARBITRATORS TO DECIDE THRESHOLD ISSUES

The District Court, presented with cross petitions to confirm and vacate the arbitral tribunal's award, concluded that its review must be "extremely limited":

> Thus, it is the arbitral panel's interpretation of the Investment Treaty, and not Argentina's (or this Court's), that controls the Court's analysis.[17]

Such deferential review of an arbitral panel's award was, in the District Court's analysis, required by the FAA:

> In fact, careful scrutiny of an arbitrator's decision would frustrate the FAA's "emphatic federal policy in favor of arbitral dispute resolution" – a policy that "applies with special force in the field of international commerce" – by

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17. *Republic of Argentina v. BG Grp. PLC*, 764 F. Supp. 2d 21, 33 (D.D.C. 2011) (App. to Pet. for Writ of Cert. 43a) (affirming arbitral award) (citation omitted).

> "undermining the goals of arbitration, namely, settling disputes efficiently and avoiding lengthy and expensive litigation."[18]

The District Court emphasized the arbitral panel's competence to interpret the treaty according to applicable principles of international law.[19]

The District Court's analysis is consistent with the intent of the sovereign parties as expressed in the Treaty. The parties left little room for doubt that they intended for threshold objections to be addressed and resolved by arbitrators appointed pursuant to the Treaty. Article 8 of the Treaty provides, in paragraph (1), that investor-state disputes are to be submitted first to the "competent tribunal of the Contracting Party in whose territory the investment was made." It then provides in paragraph (2) that such disputes "shall be submitted to international arbitration" if 18 months have elapsed after submission of the dispute to the national tribunal, or after the decision of that tribunal if the dispute continues. Paragraph (3) provides for arbitration to be conducted under the

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18. *Id.* at 29 (App. to Pet. for Writ of Cert. 34a-35a) (citations omitted).

19. *Republic of Argentina v. BG Grp. PLC*, 715 F. Supp. 2d 108, 122 (D.D.C. 2010) (App. to Pet. for Writ of Cert. 80a) (denying Argentina's petition to vacate or modify the arbitral award).

UNCITRAL Rules, unless the parties agree to other rules.

Paragraph (4) of the Treaty then specifies that, once a dispute reaches an arbitral tribunal, it should decide the dispute and its decisions will be final and binding:

> **The arbitral tribunal shall decide the dispute** in accordance with the provisions of this Agreement [the Treaty], the laws of the Contracting Party involved in the dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the **applicable principles of international law. The arbitration decision shall be final and binding on both Parties.** (Emphasis added).

International law, as embodied in the Vienna Convention, requires that "[a] treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[20] The ordinary meaning of the terms of Article 8(4) is to express Argentina's and the United Kingdom's intention that an international arbitral

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20. Vienna Convention on the Law of Treaties, art. 31(1), Mar. 23, 1969, 1155 U.N.T.S. 331.

tribunal – not a court – should rule, not only on the merits of the dispute, but also on threshold issues.

Threshold questions that typically arise in an investment-treaty arbitration include questions such as (i) is the claimant an "investor" under the applicable BIT; (ii) does the claimant have a protected "investment" under the BIT; (iii) may the "investor" claim for injury to its subsidiary incorporated in the host country or is it limited to claims alleging an interference with its shareholding; and (iv) does the dispute involve a breach of contract rather than a breach of the applicable investment treaty. Arbitrators appointed to hear BIT cases are accustomed to resolving such questions. Indeed, the award set aside by the Court of Appeals had ruled on each of these questions, as well as on other objections made by Argentina in the arbitration to the jurisdiction of the tribunal and to the admissibility of BG Group's claims.[21] Argentina never sought to enjoin the arbitration or to pursue these objections before a court until the arbitrators handed down their award. Argentina's conduct in

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21. *BG Grp. Plc. v. Republic of Argentina*, Final Award, ¶¶ 107-110 (Dec. 24, 2007) (considering whether BG is an investor); ¶¶ 111-37 (considering whether BG owned a protected investment); ¶¶ 158-85 (considering whether BG's claims were contract claims or treaty claims); ¶¶ 186-215 (consideirng whether the Treaty permitted BG to bring claims under the Treaty for actions taken by Argentina against companies incorporated in Argentina in which BG held an indirect interest).

the arbitration thus confirms what the text of the Treaty makes plain: the United Kingdom and Argentina intended for arbitrators to decide both threshold questions and the merits of the dispute.

Other provisions of Article 8 similarly indicate that the United Kingdom and Argentina did not intend for their courts to exercise primary authority over disputes about an investor's right to proceed under Article 8(2) of the Treaty. Article 8(2)(a)(ii) grants an investor the right to resort to international arbitration if the investor is dissatisfied with a decision reached by a national court under Article 8(1). Thus, Article 8(2) establishes a right to resort to international arbitration regardless of the decision reached by national courts. Any interpretation of Article 8(2) that would vest a court with the principal authority to determine whether an investor had complied with Article 8(1) would be inconsistent with that right.

The parties' intent to submit threshold questions to arbitrators is further evidenced by the Treaty provision making the UNCITRAL Rules the default choice for conducting an investor-state arbitration.[22] Article 21(1) of the UNCITRAL Rules provides that:

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22. Treaty, Art. 8(3)(b). The UNCITRAL Arbitration Rules are a body of rules for the conduct of arbitration adopted by the United Nations Commission on International Trade Law. See UNCITRAL ARBITRATION RULES (1976), *available at*

(Footnote continued on next page)

> The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

The Court of Appeals for the Second Circuit has concluded that an agreement of the sovereign parties to a BIT to conduct investor-state arbitrations under the UNCITRAL Arbitration Rules constitutes the kind of clear and unmistakable evidence contemplated by this Court's decision in *First Options of Chicago, Inc. v. Kaplan*[23] that the parties to that treaty intended threshold questions, including questions of arbitrability, to be decided by arbitrators.[24]

Amici submit that the common intention of Argentina and the United Kingdom, expressed in Article 8 of the Treaty, was to have an international arbitral tribunal decide disputes between investors

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http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf. The UNCITRAL Arbitration Rules were revised in 2010. The revised rules continue to provide that the arbitral tribunal has the power to rule on its own jurisdiction.

23. 514 U.S. 938 (1995).

24. *Schneider*, 688 F.3d at 73; *Republic of Ecuador v. Chevron Corp.*, 638 F.3d at 393-94.

and states, including any objections that a claimant's failure to proceed initially in domestic courts deprived the tribunal of jurisdiction or rendered its claim inadmissible.

B. THE COURT OF APPEALS IMPROPERLY REVIEWED THE ARBITRAL AWARD *DE NOVO*

The Court of Appeals' *de novo* review of the arbitral award thwarted the intent of the sovereign parties to the Treaty. The Court of Appeals itself recognized that "the Treaty's incorporation of the UNCITRAL Rules" provided the clear and unmistakable evidence, contemplated by the Court in *First Options*, "that the parties intended for the arbitrator to decide questions of arbitrability."[25] The Court of Appeals nevertheless found that the UNCITRAL Rules were "not triggered until after an investor has first, pursuant to Article 8(1) and (2), sought recourse, for eighteen months, in a court of the contracting party where the investment was made."[26]

There are two fundamental flaws in this reliance on what the Court of Appeals called a

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25. *Republic of Argentina v. BG Grp. PLC*, 665 F.3d 1363, 1371 (D.C. Cir. 2012) (citation omitted) (App. to Pet. for Writ of Cert. 14a).

26. *BG Grp.*, 665 F.3d at 1371 (App. to Pet. for Writ of Cert. 14a).

"temporal limitation." First, the Court of Appeals' conclusion that the UNCITRAL Rules were "not triggered" was wrong as a factual matter. It was pursuant to Article 16(1) of the UNCITRAL Rules that the parties chose Washington, D.C. as the place of arbitration. It was thus only because the UNCITRAL Rules *had* been triggered that this case was before the Court of Appeals in the first place. If the parties had chosen to hold the arbitration in another country, or even in another federal circuit, the award would have been presented for confirmation or vacatur to the court in that country or circuit.[27]

Second, the Court of Appeals' reasoning would swallow all disputes about preconditions to arbitrations and require that all threshold disputes be decided by a court, notwithstanding decisions by this Court and other circuits to the contrary.[28] *Any*

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27. Article 16(4) of the UNCITRAL Rules (1976) provides that "The award shall be made at the place of arbitration." Under the New York Convention, courts at the seat of arbitration have primary jurisdiction over applications to confirm or vacate arbitration awards. *See Karaha Bodas Co. L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 308-310 (5th Cir. 2004), *cert. denied* 125 S. Ct. 59.

28. As detailed in Petitioner's brief in support of its Petition for a Writ of Certiorari, the Courts of Appeals in the First, Sixth, Seventh, and Eighth Circuits have all held that the question of whether a condition precedent to arbitration

(Footnote continued on next page)

precondition to arbitration will by definition refer to an event or events that should have preceded the arbitration.

The text of the Treaty provides no support for the conclusion that Argentina and the United Kingdom intended for courts at the site of arbitration to make *de novo* rulings on threshold objections to the tribunal's jurisdiction. Indeed, the effectiveness of international arbitration as a means of resolving claims for breaches of an investment treaty would be impaired if national courts were to interpret such treaties as implicitly authorizing them to review *de novo* arbitrators' rulings on threshold issues simply because the parties (or the tribunal) chose to hold the arbitration in their jurisdiction. Instead, courts at the seat of an investment arbitration should give effect to the intention of sovereign parties to BITs to have their treaties interpreted and applied, on threshold issues no less than merits, by international arbitral tribunals.

The wisdom of allowing international arbitrators to rule on objections to a tribunal's jurisdiction, as the state parties to investment treaties generally provide, is illustrated by the Court of Appeals' conclusion that, in relying on the rules of

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has been satisfied is a question of procedural arbitrability for the arbitrators to decide. Pet. for Writ of Cert. 28-31.

interpretation laid down in the Vienna Convention, "the arbitral panel rendered a decision wholly based on outside legal sources and without regard to the contracting parties' agreement establishing a precondition to arbitration."[29]

The Vienna Convention is anything but an outside legal source in relation to the Treaty. The Treaty specifically instructs the arbitrators in Article 8(4) to apply "applicable principles of international law." The principles of international law applicable to the interpretation of treaties are those codified in the Vienna Convention; indeed, the Vienna Convention is an expression of international law governing treaty practice between sovereign states. Both Argentina and the United Kingdom have signed and ratified that Convention.[30] Its principles of treaty interpretation reflect customary international law[31] and are widely relied upon as a guide to interpreting and applying international treaties.[32] Whether or not one agrees with the

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29. *BG Grp.*, 665 F.3d at 1366 (App. to Pet. for Writ of Cert. 2a).

30. The United Kingdom ratified the Vienna Convention on June 25, 1971, and Argentina ratified it on December 5, 1972.

31. *See, e.g.*, *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), 1991 I.C.J. 53, ¶ 48 (Nov. 12).

32. *See e.g.*, Counter-Memorial of Respondent United States of America on Competence and Liability, *ADF Grp. Inc. v.*

(Footnote continued on next page)

arbitral tribunal's interpretation of the Treaty, the Vienna Convention simply cannot be regarded as an "outside legal source" in relation to disputes under the Treaty.[33]

The arbitral tribunal's decision that the claimant was not required to litigate in Argentina before commencing arbitration was based squarely on the body of international law properly applicable to interpretation of the Treaty. More specifically, the arbitral tribunal held that, "[a]s a matter of treaty interpretation ... Article 8(2)(a)(i) cannot be construed as an absolute impediment to arbitration."[34] This was because, in light of Argentina's measures to block access to its courts, "any such interpretation would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention, allowing the State to

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United States, Case No. ARB(AF)/00/1, at 21 ("The preeminent codification of customary international law on the interpretation of treaties is Articles 31 through 33 of the Vienna Convention on the Law of Treaties[.]").

33. *Id.*

34. *BG Grp. Plc. v. Republic of Argentina*, Final Award (Dec. 24, 2007), ¶¶ 146-47 (App. to Pet. for Writ of Cert. 165a-166a).

unilaterally elude arbitration."[35] The arbitral tribunal concluded that:

> a serious problem would loom if admissibility of Claimant's claims were denied thus allowing Respondent at the same time to: a) restrict the effectiveness of domestic judicial remedies as a means to achieve the full implementation of the Emergency Law and its regulations; [and] b) insist that Claimant go to domestic courts to challenge the very same measures.[36]

The arbitral tribunal reached this result by applying the rules of international law chosen by the parties.

The Court of Appeals replaced the arbitral tribunal's reasoned decision under Article 32 of the Vienna Convention – the law that the Treaty directed the arbitrators to apply – with its own analysis, from which principles of international law were conspicuously absent. In doing so, the Court of Appeals provided a vivid illustration of why the parties to the Treaty assigned the role of deciding disputes arising under it to international arbitrators.

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35. *Id.* at ¶ 147 (App. to Pet. for Writ of Cert. 165a).

36. *Id.* at ¶ 156 (App. to Pet. for Writ of Cert. 171a).

II. REVERSAL WOULD BE CONSISTENT WITH THIS COURT'S DECISIONS UNDER THE FEDERAL ARBITRATION ACT

The Court of Appeals' decision to impose its own interpretation of the Treaty, if not reversed, is likely to cause collateral damage to the application of the FAA to commercial arbitration agreements, because many of them also contain conditions precedent. Reversing that decision will avoid disturbing the distinction the Court has previously articulated between substantive and procedural "arbitrability" in the determination of threshold issues in commercial arbitration.

In *Howsam v. Dean Witter Reynolds, Inc.*, this Court distinguished between substantive and procedural "arbitrability" in the context of commercial arbitration, concluding:

> Thus "'procedural' questions which grow out of the dispute and bear on its final disposition" are presumptively *not* for the judge, but for the arbitrator to decide. So, too, the presumption is that the arbitrator should decide

> "allegation[s] of waiver, delay, or a like defense to arbitrability."[37]

The Court of Appeals' decision below ignores this crucial distinction between substantive and procedural arbitrability.[38] Its tautological observation that "[t]he 'gateway' question in this appeal is arbitrability"[39] shows a failure to appreciate this Court's instruction in *Howsam* that some arbitrability issues have a powerful procedural character that makes them "presumptively *not* for the judge, but for an arbitrator, to decide."[40] The Court of Appeals' reasoning is at cross-purposes with this Court's admonition that "for purposes of applying the interpretive rule, the phrase 'question of arbitrability' has a far more limited scope."[41]

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37. 537 U.S. 79, 84 (2002) (citations omitted) (emphasis in original). *Howsam* turned on whether a court or arbitrator should determine a statute of limitations dispute.

38. As detailed in the Petition for Writ of Certiorari, the Courts of Appeals for the First, Sixth, Seventh, and Eighth Circuits have each applied this Court's guidance in *Howsam* to hold that whether a condition precedent to arbitration has been satisfied is a procedural question for the arbitrators rather than a question for the courts. *See* Pet. for Writ of Cert. 28-31.

39. *BG Grp.*, 665 F.3d at 1369 (App. to Pet. for Writ of Cert. 10a).

40. *Howsam*, 537 U.S. at 84.

41. *Id.* at 83.

The Court of Appeals suggested that, in *Howsam*, "[t]he question of arbitrability . . . was intertwined with the facts underlying the substantive dispute . . . , [whereas h]ere, the question of arbitrability is separate from the underlying dispute."[42] That statement is simply incorrect. The arbitrators' analysis of Article 8 of the Treaty was heavily intertwined with the effects of the Argentine legislation that lay at the heart of the claimant's claim on the merits.[43]

But the question of whether the courts or the arbitrators should rule on a procedural objection, such as a failure to satisfy a condition precedent to arbitration, should not in any event turn on the extent to which the procedural objection is intertwined with the facts underlying the substantive dispute. *Howsam* points to a simpler solution. The key distinction that emerges from *Howsam* and its progeny is whether an objection to arbitration calls into question the existence or validity of an arbitration agreement, on the one hand, or features of the arbitral process, on the other. In the former situation – which this Court has referred to as raising issues of substantive

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42. *BG Grp.*, 665 F.3d at 1372 n.6 (App. to Pet. for Writ of Cert. 18a).

43. *BG Grp. Plc. v. Republic of Argentina*, Final Award (Dec. 24, 2007), ¶¶ 147-57 (App. to Pet. for Writ of Cert. 165a-171a).

arbitrability – the threshold objection strikes at the very heart of the legitimacy of arbitration, namely consent, and is, presumptively, for the courts to decide.[44]

In the latter situation, by contrast, the objection implicates neither the existence nor the validity of the arbitration agreement, nor any other fundamental aspect of consent, but rather involves differences over when and how the arbitral process should unfold. Such an objection is one that the arbitral tribunal should be permitted to decide. A failure to satisfy a condition precedent is not the only example of this category of objection.[45] Other examples include assertions that (i) a claim is time barred, as in *Howsam*;[46] (ii) a claim is barred by *res*

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44. *See* George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1, 29-30 (2012).

45. *See, e.g., John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). *See also Dialysis Access Ctr., LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 383 (1st Cir. 2011); *Lumbermens Mut. Cas. Co. v. Broadspire Mgmt. Servs.*, 623 F.3d 476, 477 (7th Cir. 2010); *3M Co. v. Amtex Sec., Inc.*, 542 F.3d 1193, 1200 (8th Cir. 2008); *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 392 (6th Cir. 2008).

46. *See, e.g., Howsam*, 537 U.S. 79 (2002). *See also Int'l Union of Operating Eng'rs v. Flair Builders, Inc.*, 406 U.S. 487, 491 (1972).

judicata;[47] (iii) the claimant waived its right to arbitrate;[48] or (iv) the parties did not agree to class arbitration.[49] Reserving these types of objections for arbitrators helps ensure the efficiency of arbitral proceedings in the United States, without detriment to their legitimacy.[50]

Because commercial contracts and BITs share the tendency to specify steps that must be taken before commencing arbitration, the Court of Appeals' decision could have consequences far beyond the field of investment arbitration.[51] According to the

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47. *See, e.g.*, *Shell Oil Co. v. CO2 Comm., Inc.*, 589 F.3d 1105, 1109-10 (10th Cir. 2009); *Emilio v. Sprint Spectrum, L.P.*, 315 F. App'x 322, 324 (2d Cir. 2009); *Triangle Constr. & Maint. Corp. v. Our V.I. Labor Union*, 425 F.3d 938, 947 (11th Cir. 2005). *But see FleetBoston Fin. Corp. v. Alt*, No. 10-1035, 2011 U.S. App. LEXIS 5853, at *4 (1st Cir. Mar. 23, 2011).

48. *See, e.g.*, *Republic of Ecuador*, 638 F.3d at 393-94; *ProTech Indus., Inc. v. URS Corp.*, 377 F.3d 868, 871-72 (8th Cir. 2004); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1109-10 (11th Cir. 2004).

49. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452-54 (2003) (plurality opinion).

50. *See* Bermann, *supra* note 37, at 40-47.

51. Int'l Bar Ass'n, IBA Guidelines for Drafting International Arbitration Clauses 30 (2010) ("It is common for dispute resolution clauses in international contracts to provide for negotiation, mediation or some other form of alternative dispute resolution as preliminary steps before arbitration.").

American Arbitration Association's *amicus* brief in support of the grant of certiorari, "approximately 51% of the U.S. companies and 60% of the U.K. companies surveyed had resolved disputes through contractually agreed staged processes involving negotiation, mediation and arbitration."[52] Each such staged process specifies some step that must precede arbitration.

The decision of the Court of Appeals, by lumping all questions of arbitrability together, confuses the distinction articulated in *Howsam*, and thus leaves uncertain the respective roles of courts and arbitrators in deciding whether an arbitration should proceed. A reversal of that decision would not only offer the Court an opportunity to provide guidance to lower courts called upon to deal with awards entered in investment arbitrations, but would also allow the Court to correct a likely source of confusion for lower courts dealing with commercial arbitrations.

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52. Brief of American Arbitration Association as *Amicus Curiae* Supporting Petitioner, at 8, *BG Grp. PLC v. Republic of Argentina*, No. 12-138 (S. Ct. Aug. 27, 2012).

CONCLUSION

For the foregoing reasons, the undersigned *amici* urge the Court to vacate the decision of the Court of Appeals and to reinstate the decision of the District Court confirming the award of the arbitrators.

August 30, 2013

Respectfully submitted,

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APPENDIX A

APPENDIX A

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Lea Brilmayer is the Howard M. Holtzmann Professor of International Law at Yale Law School. She is the author of *Justifying International Acts* and *American Hegemony: Political Morality in a One-Superpower World*. Professor Brilmayer has served as lead counsel in state-to-state arbitrations dealing with island sovereignty, maritime delimitation, land boundaries, and mass claims for violations of the laws of war.

David D. Caron is Dean and Professor of Law at The Dickson Poon School of Law at King's College, London and the C. William Maxeiner Distinguished Professor of Law (Emeritus) at the University of California at Berkeley. He is the immediate past President of the American Society of International Law, Co-Director of the Law of the Sea Institute, and a member of the Board of Editors of the American Journal of International Law. He is also a barrister with chambers at 20 Essex Street in London.

Appendix A

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Howard O. Hunter is Professor of Law at Singapore Management University, of which he was for six years the President. He is also Professor of Law Emeritus and former Dean of the School of Law of Emory University and is the author of *Modern Law of Contracts*. Professor Hunter is member of the Board of Directors of the American Arbitration Association.

Judith Kaye is Of Counsel to the firm of Skadden Arps Slate Meagher & Flom LLP in New York. For 15 years up to 2009, Judge Kaye was Chief Judge of the State of New York. She is a member of the Board of Directors of the American Arbitration Association and was formerly President of the Conference of Chief Justices and Chair of the Board of Directors of the National Center for State Courts.

Carolyn Lamm is a partner in the firm of White & Case LLP. She is a former President of the American Bar Association, former President of the D.C. Bar, a member of the Council of the American Law Institute, and a member of the Executive Committee of the Board of Directors of the American Arbitration Association.

Appendix A

Andreas F. Lowenfeld is the Herbert and Rose Rubin Professor of International Law Emeritus at New York University School of Law. He served as Associate Reporter of the American Law Institute's Restatement (Third) of Foreign Relations Law and Co-Reporter of the Institute's Project on Recognition and Enforcement of Foreign Judgments. Before coming to NYU, Professor Lowenfeld served as Deputy Legal Adviser of the United States Department of State.

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Daniel M. Price is an independent legal practitioner and arbitrator who was formerly a partner in the firm of Sidley Austin LLP. Mr. Price served in government as deputy agent of the United States to the Iran-U.S. Claims Tribunal, Deputy General Counsel in the Office of the U.S. Trade Representative, and Assistant to the President for International Economic Affairs. He is a member of the Board of Directors of the American Arbitration

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Appendix A

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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In the Supreme Court of the United States

BG GROUP PLC, *PETITIONER*

v.

REPUBLIC OF ARGENTINA, *RESPONDENT*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* THE REPUBLIC OF ECUADOR IN SUPPORT OF RESPONDENT

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

This case presents the Court with its first opportunity to consider and determine the standards U.S. courts should use when deciding whether to confirm an investor-state arbitral award rendered against a sovereign State under a treaty, here a bilateral investment treaty (BIT), where the State disputes having consented to the arbitration at issue. This Court's decision, in turn, may impact the foreign relations of the United States in its dealings with other nations under existing or prospective treaties governing their investment disputes with U.S. investors as well as investment disputes between their nationals and the United States. It also may influence how foreign courts treat the United States in analogous circumstances. With the number of investor-state treaty arbitrations—and, accordingly, award confirmation proceedings—on the rise, it is important for this Court to articulate workable and sensible standards for U.S. courts to apply when determining whether a State has truly consented to arbitration.

Amicus curiae The Republic of Ecuador is a sovereign State. Ecuador is party to numerous BITs, including with the United States. See Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, Aug. 27, 1993, S. Treaty Doc. 103-15 (U.S.-Ecuador BIT). In fact, the U.S.-Ecuador BIT was the United States' first such treaty

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[1] No counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel, nor any entity other than *amicus curiae* and its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. The parties have filed letters with the Clerk's office consenting to the filing of *amicus* briefs.

with an Andean Pact country and only the second to be signed with a South American country. Moreover, Ecuador has faced proceedings brought in U.S. court to confirm a BIT-based arbitral award rendered against it. See *Chevron Corp.* v. *Republic of Ecuador*, __ F. Supp. 2d __, 2013 WL 2449172 (D.D.C. June 6, 2013) (confirming award).[2]

Ecuador agrees with the United States that it is inappropriate to apply this Court's private arbitration precedents in the context of treaty arbitration. See Brief for the United States as *Amicus Curiae* in Support of Vacatur and Remand (filed Sept. 3, 2013) (U.S. Br.). Rather, treaty interpretation principles should govern a reviewing court's consideration of a State's objection that it did not consent to arbitrate a particular investor-state dispute (thus preventing an agreement to arbitrate from being formed), and such review should be *de novo*. Because the D.C. Circuit's analysis aligned with those principles, it reached the right result. Consequently, this Court should affirm the ruling below in favor of Respondent The Republic of Argentina.

Here, the question before the D.C. Circuit was simple, because the treaty clause at issue was explicit. That will not always be the case. Ecuador's status as a sovereign State and a U.S. BIT partner positions it to provide experienced insight into the requirements of Sovereign arbitral consent, and how federal courts might recognize and analyze them to best give

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[2] The D.C. Circuit granted Ecuador's motion to hold in abeyance its appeal of the district court's decision pending this Court's ruling here, see Order, *Chevron Corp.* v. *Republic of Ecuador*, No. 13-7103 (D.C. Cir., filed Oct. 17, 2013), underscoring further Ecuador's interest in the outcome of this case.

effect to the shared intent of States parties to treaties.

STATEMENT

The 1990 BIT between the United Kingdom and Argentina (U.K.-Argentina BIT) reflects the States parties' shared intent to consent to the arbitration of investment disputes *only* if certain conditions were first satisfied. The condition relevant to this case is that, "after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made"—i.e., the courts of Argentina—"the said tribunal has not given its final decision[.]" U.K.-Argentina BIT, Art. 8(2)(a)(i). In other words, the investor must first submit its claim to the Argentine courts, and then give them eighteen months to resolve it.

After seeing its investment in Argentina's natural gas distribution sector adversely effected by certain market-correction measures Argentina took in the wake of an economic crisis, BG Group purported to accept Argentina's standing offer (contained in the BIT) to arbitrate claims by British investors for violations of their rights under the U.K.-Argentina BIT. Pet. App. 94a. It did so, however, by initiating arbitration without first going to "the competent tribunal"—court—in Argentina. *Id.* at 95a.

Accordingly, Argentina objected that the arbitral panel did not have jurisdiction to decide the dispute. The panel rejected Argentina's objections and issued an arbitral award in BG Group's favor. It determined that the litigation precondition was excused because of alleged intervention by the Executive in Argenti-

na's courts. *Id.* at 5a. The panel further ruled for BG Group on the substance of the dispute. *Id.* at 297a.

Argentina asked the district court to vacate the arbitration award. The court concluded that the arbitral tribunal had jurisdiction to determine its own jurisdiction, to which determination the court would give deference. *Id.* at 42a-43a. Applying the deferential standard, the district court denied Argentina's motion to vacate, and granted BG Group's motion to confirm the award. *Id.* at 41a-43a.

The U.S. Court of Appeals for the D.C. Circuit reversed. *Id.* at 2a, 20a. It recognized the primary importance of giving effect to the States parties' shared intent, asking: Did the U.K. and Argentina, "as contracting parties, intend that an investor under the Treaty could seek arbitration without first fulfilling" the litigation precondition? Pet. App. 10a. Turning to the antecedent question whether a court or an arbitrator should provide the answer, the court of appeals explained that this Court "has held that the intent of the contracting parties controls whether the answer to the question of arbitrability is to be provided by a court or an arbitrator." *Id.* (citing *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995)). That intent, the D.C. Circuit concluded, dictated that a court determine arbitrability. See Pet. App. 15a ("It would be odd to assume that where the gateway provision *itself* is resort to a court, the parties would have been surprised to have a court, and not an arbitrator, decide whether the gateway provision should be followed.").

Analyzing the BIT through the lens of the States parties' intent, the court of appeals "'conclude[d] that there can be only one possible outcome on the [arbitrability question]' * * * namely, that BG Group was

required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration pursuant to Article 8(3) if the dispute remained[.]" Pet. App. 19a-20a (quoting *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1770 (2010)). And in light of an "explicit" treaty provision, the federal pro-arbitration policy could "[ ]not function to override the intent of the contracting parties" to the treaty. Pet. App. 18a.

In vacating the award, the court of appeals explained that "a court cannot lose sight of the principle that led to a policy in favor of arbitral resolution of international trade disputes: enforcing the intent of the parties." Pet. App. 19a.

SUMMARY OF THE ARGUMENT

The D.C. Circuit properly vacated an arbitral award rendered by a tribunal that had "ignore[d] the terms of the Treaty[.]" Pet. App. 2a. The court of appeals recognized that the fact that the dispute arose out of "an international investment treaty between two sovereigns" placed it in "an entirely different context" from this Court's private arbitration precedent, such as *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964). *Id.* at 17a. And the court of appeals concluded correctly that "[b]ecause the Treaty provision at issue is explicit, the usual 'emphatic federal policy in favor of arbitral dispute resolution,' *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), cannot function to override the intent of the contracting parties." *Id.* at 18a. This Court should therefore affirm.

In the world of investment treaties (including those to which the U.S. is a party), there exists a variety of other conditions on a sovereign State's con-

sent to arbitrate that are not nearly so "explicit" as a litigation precondition. For example, a treaty may consent only to arbitration of those investment disputes arising after the treaty's effective date; determining whether that condition is met may require a more detailed inquiry into the origin of the parties' dispute.

In its merits brief, the United States argues that treaty interpretation principles should be brought to bear on the decision whether to confirm an investor-state arbitral award. Ecuador agrees. That said, the D.C. Circuit's rationale in this case sounded in treaty interpretation even as it purported to apply this Court's private arbitration precedents. For this reason Ecuador disagrees with the United States and respectfully suggests that vacatur and remand are unnecessary. Rather, the appropriate course is to affirm, and in the process provide needed guidance to the federal judiciary.

Such guidance should include the direction to apply established principles of treaty interpretation to determine whether to confirm an investor-state arbitral award. An investment treaty constitutes a standing conditional offer to arbitrate, so an investor's purported acceptance must match the Sovereign's offer, term for term, before an agreement to arbitrate has been consummated. Accordingly, this Court should hold that *de novo* review is appropriate where the State's objection goes to consent—namely, that the investor's purported "acceptance" was not valid because it failed to mirror the Sovereign's "offer."

ARGUMENT

I. The opinion below should be affirmed because the D.C. Circuit reached the result compelled by sound principles of treaty interpretation.

A brief recitation of the established principles that federal courts should apply when interpreting treaties demonstrates why this Court should affirm the D.C. Circuit's decision here. The court of appeals, while not applying those principles expressly, undertook a similar analysis and reached the conclusion compelled by sound treaty arbitration principles—that the arbitral award must be vacated.

In construing a treaty, federal courts should "begin with the text of the treaty and the context in which the written words are used." *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 699 (1988) (citation omitted). If necessary, courts should then look "beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *E. Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 534-35 (1991). Courts have a "responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France* v. *Saks*, 470 U.S. 392, 399 (1985). As the United States explains, these "basic principles of treaty interpretation are generally adhered to among Nations," and thus apply whether or not the United States is a party to the treaty at issue. U.S. Br. 17; see *id.* at 17 & n.4 (Although not a party to the Vienna Convention, which echoes those principles, the United States recognizes it "as an authoritative guide to treaty interpretation.").

Consistent with these principles, the D.C. Circuit construed the plain language of the U.K.-Argentina BIT to give effect to the intent of the contracting States parties. See, *e.g.*, Pet. App. 10a (recognizing "the *antecedent question of whether the contracting parties intended*" a court or an arbitrator to decide whether an investor could bypass the litigation precondition) (emphasis added); *id.* at 13a-15a (analyzing the interplay between subsections (1), (2) and (3) of Article 8 of the U.K.-Argentina BIT, and finding contextually significant that Article 9(2) provides authority to the arbitrator that is absent in Articles 8(1) and (2)). Notably, the court of appeals explained that "[t]he dispute between Argentina and BG Group ar[o]se[ ] in an entirely different context" from this Court's private arbitration precedent: "an international investment treaty between two sovereigns." *Id.* at 17a.

In the end, the court of appeals recognized that Article 8(2) of the U.K.-Argentina BIT unambiguously required BG Group to pursue its claim in Argentinian court for eighteen months before it could initiate arbitration. And because satisfaction of that condition—and hence Argentina's consent to arbitration—was in dispute, "the usual 'emphatic federal policy in favor of arbitral dispute resolution,' *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), cannot function to override the intent of the contracting parties." Pet. App. 18a. Nor could the BIT's reference to the UNCITRAL Rules (which grant the arbitrator the power initially to determine issues of arbitrability) foreclose the court's duty to ensure satisfaction of the antecedent requirement of

a valid agreement to arbitrate.[3] See *id.* at 13a ("[T]he district court clearly erred in finding that Argentina had conceded that the arbitrator had the power to determine arbitrability under the circumstances.").

The D.C. Circuit's analysis sounded in established treaty principles, even if it did not apply them expressly. And those principles lead inexorably to the same conclusion. The proper course, therefore, is to affirm. Vacating and remanding, as the United States urges, would waste both the court's and parties' time and resources, and would serve no purpose. See, *e.g.*, *Already, LLC* v. *Nike, Inc.*, 133 S. Ct. 721, 732-33 (2013) (affirming, notwithstanding that "the courts below did not expressly invoke the [correct] standard," because "a remand would serve no purpose").

II. This Court should establish that treaty interpretation principles govern review of whether a state consented to arbitrate a dispute pursuant to an investment treaty.

In one respect, the court of appeals' task in this case was simple. As the D.C. Circuit recognized, Article 8(2) of the U.K.-Argentina BIT is "explicit," Pet.

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[3] *Republic of Ecuador* v. *Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011), is not to the contrary. There, the Second Circuit was not presented with the question what standard of review should govern a court's consideration of a challenge to an arbitral tribunal's determination on any issue, jurisdictional or otherwise. Instead, in an action to stay a nascent arbitration, the court held that certain "threshold issues like estoppel and waiver" were left "to the arbitral panel *in the first instance*[,]" *id.* at 392 (emphasis added), without addressing the level of scrutiny it might apply to the panel's decisions in a later action to enforce or vacate any resulting award.

App. 18a, and it was therefore easy to conclude that BG Group was required to comply with it before initiating arbitration. Indeed, the court correctly "conclude[d] that there can be only one possible outcome" to the question before it. *Id.* at 19a (quoting *Stolt-Nielsen S.A.*, 130 S. Ct. at 1770). Put another way, a term of Argentina's standing offer to arbitrate was that an investor first would satisfy Article 8(2)—the litigation precondition. Any investor that failed to do so, yet purported to initiate arbitration anyway, would *not* have formed a valid agreement to arbitrate because the would-be acceptance did not match each term of the offer.[4] Consequently, the court of appeals' analysis dovetailed with sound treaty interpretation principles even as it reached the same conclusion.

Not every case will be as straightforward. For example, in entering into the U.S.-Ecuador BIT, the States parties sought to "stimulate the flow of private capital" from the United States into Ecuador by reaching "agreement upon the treatment to be accorded such investment." U.S.-Ecuador BIT, Preamble. The two States agreed to arbitrate disputes arising over such investments. *Id.* Art. VI(4). Importantly, however, and consistent with the BIT's forward-

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[4] Indeed, this Court should affirm even if it decides to extend its private arbitration precedents to the investor-state context, because the existence of a valid agreement to arbitrate is a question properly resolved by courts *de novo*. See *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) ("Thus, a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide."); Brief for Respondent 29 (The court of appeals' "decision that the only possible conclusion is that the arbitral tribunal lacked jurisdiction, because there was no agreement to arbitrate with BG under the plain text of the Treaty, is correct.").

looking purpose, the BIT provided that it only "shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter." *Id.* Art. XII(1).

What, then, of the question whether a particular investment "exist[ed]" at the time of the BIT's entry into force? Or, antecedent even to that inquiry, did a particular interest of an investor constitute an "investment" in the first place? Both of those requirements—(1) an investment (2) that existed at least as of the BIT's entry into force—are, like the BIT's remaining clauses, terms of Ecuador's standing offer to arbitrate with U.S. investors (and vice versa). Accordingly, any investor that cannot establish both preconditions, yet who initiates arbitration anyway, will have failed to create a valid agreement to arbitrate because its purported acceptance does not align with the State's offer.[5]

A reviewing court, moreover, should apply treaty interpretation principles to determine whether an investor has satisfied these conditions when the State objects that it has not. That is the only way to give effect to the shared intent of the States parties. See U.S. Br. 16 ("It is therefore the shared intent of the *treaty* parties, not the disputing parties, that determines the existence and substance of an agreement to arbitrate."). Those principles, as described previous-

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[5] These are the issues that underlie Ecuador's appeal to the D.C. Circuit, *supra* note 2. In the district court, Ecuador objected to confirmation of the arbitral award against it on the grounds that, inter alia, its standing offer to arbitrate contained in the U.S.-Ecuador BIT did not represent consent to arbitrate lawsuits initiated by Chevron regarding pre-BIT investments it closed out years before the Treaty's effective date.

ly, require close analysis of the treaty's text, as well as resort "to the larger context that frames the [t]reaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Minn.* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (quotation omitted).

Ensuring that the federal judiciary is prepared to confront States' challenges to claims that they consented to arbitrate a particular dispute is all the more important in light of the substantial number of investment treaties to which the U.S. is party.[6] More of those agreements are on the horizon. For example, in June 2013 President Obama and European leaders "announced that the United States and the European Union (EU) will launch negotiations on a Transatlantic Trade and Investment Partnership (TTIP) agreement." Office of the U.S. Trade Representative, *Transatlantic Trade and Investment Partnership (TTIP)*, available at http://www.ustr.gov/ttip (accessed Oct. 23, 2013).[7] The TTIP agreement almost

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[6] The United States is party to forty-two BITs currently in force. Trade Compliance Center, *Bilateral Investment Treaties Currently in Force*, available at http://tcc.export.gov/Trade_ Agreements/Bilateral_Investment_Treaties/index.asp (accessed Oct. 28, 2013). Additionally, the U.S. is party to regional treaties with investment-protection provisions, including the North American Free Trade Agreement and the Central America Free Trade Agreement.

[7] Further, the United States and eleven other nations—Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam—are at an advanced stage of negotiations for the Trans-Pacific Partnership (TPP), with plans for investment-protection provisions. See Office of the U.S. Trade Representative, *Trans-Pacific Partnership (TPP)*, available at http://www.ustr.gov/tpp (accessed Oct. 27, 2013).

certainly will include an investment arbitration chapter. See, *e.g.*, European Commission, *TTIP Questions & Answers*, available at http://ec.europa.ed /trade/policy/in-focus/ttip/questions -and-answers (accessed Oct. 28, 2013) ("Why is the EU including Investor to State Dispute Settlement in the TTIP?"). And "if it comes to fruition, [it will] be the biggest trade deal in the history of the world." Posting of Lydia DePillis to *The Washington Post*'s Wonkblog, http://www.washingtonpost.com/blogs/wonkblog (July 8, 2013, 10:26 EST).

Against this backdrop, federal courts require this Court's guidance so they properly can review not only the simple treaty arbitration cases, but also the less obvious ones. Cf. Posting of Michael D. Goldhaber to *The American Lawyer*'s AmLaw Litigation Daily, http://www.americanlawyer.com (July 21, 2013, 21:32 EST) ("The role of the Supreme Court should not be just to manage the closed system of U.S. justice, but to create a climate of legal certainty for businesses that operate globally, not to mention sovereigns that operate globally."). That is why it is important that the Court's opinion analyze the U.K.-Argentina BIT at issue in this case at a level of generality that permits lower courts to apply that analysis to other agreements in which the conditions are not as explicit as the litigation precondition at issue here.

III. Respect for sovereignty dictates *de novo* review of a state's consent-based objection to arbitration.

As part of that analysis, the Court should also hold squarely that a State's consent-based objection to arbitration is subject to *de novo* review. Over 200 years ago, "Chief Justice Marshall first emphasized

the 'exclusive and absolute' nature of a nation's territorial jurisdiction, any exception to which could arise only from the consent or waiver of that nation." *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 705 (9th Cir. 1992) (quoting *The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812)). And mandatory arbitration is an enormous "exception" to the right of a sovereign nation to insist upon its own "territorial jurisdiction" over disputes involving the State.

More recently, Congress enacted the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602 et seq., to codify exclusive criteria for establishing consent or waiver of immunity from our courts' exercise of jurisdiction to adjudicate disputes involving foreign sovereigns. See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 489 (1983) (The FSIA "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities."). The FSIA, which delineates specific exceptions to immunity, is the "sole basis for obtaining jurisdiction over a foreign state in federal court[.]" *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989). The FSIA's exceptions are "narrowly construed." *Haven* v. *Polska*, 215 F.3d 727, 731 (7th Cir. 2000). And "[t]he existence of subject matter jurisdiction under the FSIA is a question of law subject to de novo review." *Siderman de Blake*, 965 F.2d at 706. Courts must scrutinize independently (and carefully) whether an exception is satisfied: "[S]ubject matter jurisdiction in any [FSIA] action depends on the *existence* of one of the specified exceptions to foreign sovereign immunity"—not on an exception's mere *invocation*. *Verlinden B.V.*, 461 U.S. at 493 (emphasis added). Thus,

"at the threshold of every action * * * the court must *satisfy itself that one of the exceptions applies*—and in doing so it must *apply* the detailed federal law standards set forth in the Act." *Id.* at 493-94 (emphasis added).

The FSIA's so-called "arbitration exception" permits federal courts to exercise subject-matter jurisdiction over an action "to confirm an award made pursuant to * * * an agreement to arbitrate[.]" 28 U.S.C. § 1605(a)(6). But this exception contains the predicate condition that the foreign state in fact agreed to arbitrate the particular dispute at issue. See, *e.g.*, *Cargill Int'l S.A.* v. *M/T Pavel Dybenko*, 991 F.2d 1012, 1017 (2d Cir. 1993) ("Section 1605(a)(6)(B) of the FSIA provides an exception to sovereign immunity in cases *where a foreign state has agreed to arbitrate and* the arbitration agreement is or may be governed by a treaty signed by the United States calling for the recognition and enforcement of arbitral awards.") (emphasis added). As the *Cargill* court explained, Senator Mathias, "the main sponsor of the bill to amend the FSIA to provide for this exception, [stated,] 'unless the arbitration agreement is enforceable, the arbitration is meaningless[.]'" *Id.* at 1017 n.4 (quoting 131 Cong. Rec. S5371 (daily ed. May 3, 1985) (statement of Sen. Mathias)).[8]

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[8] Ecuador's experience highlights the need for this Court's guidance that the primacy of consent requires *de novo* review of consent-based objections, particularly in the case of a foreign sovereign. In Ecuador's case, the district court viewed as "novel" Ecuador's argument "that it never consented to arbitrate the underlying dispute in this matter, meaning the award was not rendered 'pursuant to * * * an agreement to arbitrate,' [under the FSIA] and that the Court must satisfy itself of the arbitrability of the underlying dispute before finding subject-matter jurisdiction over this enforcement proceeding." *Chevron Corp.*,

Senator Mathias explained further that the arbitration exception would "reassure businesses that the international arbitration process will work * * * by amending the FSIA to say that an agreement to arbitrate constitutes a waiver of immunity in an action to enforce that agreement or the resultant award." *Ibid.* Any finding of waiver, whether express or implied, must be supported by an element of intentionality. See, *e.g.*, *Black's Law Dictionary* 1717 (9th ed. 2009) ("The voluntary relinquishment or abandonment—express or implied—of a legal right or advantage * * * * The party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it."). In the context of a treaty's function as a standing conditional offer to arbitrate, the States parties' intent, therefore, must be afforded primary importance. Accordingly, the question whether an investor's purported acceptance of a State's offer to arbitrate contained in an investment treaty consummates a valid agreement to arbitrate invokes an exception to the FSIA requiring a court's *de novo* review.

Similarly, the New York Convention—often the vehicle for seeking recognition and enforcement of non-domestic arbitral awards (including BG Group's award here)—permits a reviewing court to refuse to recognize and enforce an award which "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it con-

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2013 WL 2449172, at *3. For reasons explained in the text, this proposition is compelled by sound principles of treaty interpretation, and therefore, at least after the Court's decision in this case, should no longer be viewed as "novel."

tains decisions on matters beyond the scope of the submission to arbitration[.]" Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V(1)(c), June 10, 1958, 21 U.S.T. 2517 (reprinted following 9 U.S.C. § 201). Here, too, the focus is on acceptance matching the offer—whether the State in fact agreed to arbitrate that particular dispute.

Limiting the circumstances in which federal courts can exercise jurisdiction over a foreign state reflects not only longstanding practices of respect and comity, but also the United States' interest in receiving similar treatment from foreign courts. See, *e.g.*, *Aquamar, S.A.* v. *Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1294-95 (11th Cir. 1999) (describing the Congressional purposes behind the FSIA as "codifying pre-existing international and federal common law"; "promoting harmonious international relations"; "and according foreign sovereigns treatment in U.S. courts that is similar to the treatment the United States would prefer to receive in foreign courts") (alterations, quotation marks and citations omitted).

Generally, of course, "[a]rbitration is strictly a matter of consent, and thus is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration." *Granite Rock Co.* v. *Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2857 (2010) (internal quotations and citations omitted). Accordingly, ensuring that a particular dispute falls within the scope of a State's consent—by reviewing the question *de novo* when the State maintains it has not consented—is uniquely important in the investor-state treaty arbitration context for several reasons.

Foremost among them is that an investment treaty, to the extent it represents a standing offer to arbi-

trate, constitutes a voluntary derogation of sovereignty—a consensual exception to jurisdictional immunity under the FSIA. See Andrea Marco Steingruber, *Consent in International Arbitration* 236 (2012) (Steingruber) ("[T]he consent to arbitrate has been often seen by host States as a derogation from their sovereignty."). And "[a]s treaties establish restrictions or limitations on the exercise of sovereign rights by signatory States, courts should interpret treaty provisions narrowly—for fear of waiving sovereign rights that the government or people of the State never intended to cede." *Kreimerman* v. *Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634, 639 (5th Cir. 1994); see Steingruber 254 ("[I]nvestment arbitration is always based on an arbitration agreement, and consent to arbitration is an indispensable requirement for an arbitral tribunal's jurisdiction.").

These considerations help explain why a State's reasons for choosing to include in a treaty recourse to international arbitration as a procedural remedy for investment-dispute resolution do not support the "emphatic federal policy in favor" of arbitration that underlies this Court's commercial-arbitration decisions. *Mitsubishi Motors Corp.*, 473 U.S. at 631. For example, States parties to a BIT will negotiate for guaranteed access by their own nationals to arbitration of *qualifying* disputes to avoid the risk—if not the reality—of judicial bias in favor of the State in whose courts the claimant seeks compensation for the State's alleged violations of specific investment-protection provisions in the treaty.

Such sovereign concerns are fundamentally different from those of commercial parties, who include arbitration clauses in their business agreements in order to "trade[ ] the procedures and opportunity for re-

view of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.* at 628. Consequently, courts assessing whether arbitrators wrongly asserted jurisdiction over a dispute that is outside the scope of a State's consent manifested in a BIT should be guided by principles of treaty interpretation and respect for sovereignty—a different paradigm for addressing the questions whether and when to defer to an arbitral tribunal's decisions than that applied in the commercial context.

Additionally, as the United States points out, "[i]n an investment treaty, the States parties typically do not address the arbitration of any particular dispute. The host State's standing offer to arbitrate under the treaty is made with respect to a class of investors as a whole." U.S. Br. 17 (citing Gus Van Harten, *Investment Treaty Arbitration and Public Law* 63 (2007)). Accordingly, the treaty's terms represent the scope of the State's consent to arbitrate. An investor thus can accept the offer only by accepting *all* of its terms; any purported modification would require the State to accept the new terms separately:

> The undertaking to arbitrate in the investment treaty itself contains those terms on jurisdiction; the validity of the agreement to arbitrate is contingent upon the investor claimant's acceptance of them. In other words, if the investor claimant, in its notice of arbitration, purports to modify those terms in any respect, then that would constitute a counter-offer and the respondent host state would have to accept those new terms concerning the arbitral tribunal's jurisdiction in a separate legal instrument.

Zachary Douglas, *The International Law of Investment Claims* 76 (2009).

In investor-state arbitration, this means that the investor must first satisfy every precondition to acceptance present in the treaty before the State will be found to have consented to arbitrate a dispute. See U.S. Br. 19 ("If a condition on the State's consent to arbitrate with an investor is not satisfied, no arbitration agreement will be formed when the investor attempts to initiate arbitration.") (citing *Waste Mgmt., Inc.* v. *United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award ¶ 16 (June 2, 2000), 40 I.L.M. 56, 63 (2001) (NAFTA)); Steingruber 26 ("The provisions provided in investment laws or treaties by which a State generally agrees to arbitrate investment disputes have regularly been seen as unilateral standing offers to arbitrate with any party *fulfilling the requirements*." (emphasis added).

A court's review of an arbitral tribunal's determination that an investor in fact satisfied the treaty's terms—and thus that the State in fact consented to arbitrate—must be *de novo*. A fresh assessment is required in light of the fact that an investment treaty with an arbitration provision represents the States' consent to arbitration of only *qualifying* (not *all*) disputes. As the United States puts it, "[t]o defer to an arbitral tribunal's ruling where the host State denied that it entered into an arbitration agreement with the particular investor would thus be to assume the very arbitral authority that the State denies ever arose." U.S. Br. 22-23 (citing domestic and international authorities). Permitting a decision by private arbitrators to override immunity when the State denies waiving it contravenes the traditional respect for, and protection of, sovereignty. The United States

would neither appreciate nor expect such treatment abroad. Nor would a foreign sovereign (such as Ecuador or Argentina) appreciate or expect it here.

CONCLUSION

The Court should affirm the judgment of the court of appeals, and should emphasize that U.S. courts should exercise *de novo* review of States' objections based upon a lack of consent to arbitration.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

BG GROUP PLC, PETITIONER

v.

REPUBLIC OF ARGENTINA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37, the United States Council for International Business ("USCIB") respectfully submits this brief as *amicus curiae* in support of petitioner, BG Group PLC.

Founded in 1945, USCIB promotes free trade and represents U.S. business interests before international and intergovernmental entities. Among its many other roles, the USCIB represents the central values, ideas, and common interests of U.S. international businesses before U.S. policymakers as well as officials in the United Nations, the European Union, and other governments and organizations. The USCIB represents the U.S. international business community interests in the International Chamber of Commerce ("ICC"), the world business organization created in 1919 to promote trade and investment, open markets, and the free flow of capital.

Because of the vital role that arbitration plays in international business, the USCIB also represents the interests of the U.S. business community in connection with the ICC's international arbitration functions. The International Court of Arbitration®, established by the ICC in 1923, is the world's leading institution for international commercial arbitration. International arbitration practitioners appointed by

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

the USCIB play key roles in ICC arbitration proceedings, on the ICC Commission on Arbitration, and on other ICC arbitration bodies. Moreover, U.S. parties are the principal users of the International Court of Arbitration. In addition, the U.S. is frequently selected as the place of arbitration by the International Court of Arbitration. See ICC Int'l Ct. of Arb. Bulletin, Vol. 21/1 (2010).

The D.C. Circuit's decision has far-reaching and adverse implications for the future of the United States as an attractive forum for international arbitration and for the freedom of choice to arbitrate, in particular the freedom of the parties to delegate to the arbitrators the authority to rule on their own jurisdiction. The arbitration rule at issue in this case—Rule 21 of the United Nations Commission on International Trade Law ("UNCITRAL")—is similar to ICC Rule 6.5 in delegating to the arbitrators questions of arbitrability. The USCIB, as the representative of U.S. international business community interests in the ICC, shares a common interest with other arbitration institutions in how courts interpret the scope of the parties' delegation of authority through that rule to arbitrators to decide questions of arbitrability. The USCIB and its members, then, have a strong interest in correcting the erroneous judgment of the court below.

SUMMARY OF ARGUMENT

This Court has consistently emphasized the central importance of protecting the decision of parties to a contract to resolve their disputes through arbitration. Applying that basic principle, federal courts have repeatedly held that where parties agree

that a dispute should be submitted to arbitration pursuant to one of certain sets of arbitral rules—rules that include provisions delegating to the arbitral tribunal the authority to determine questions as to its own jurisdiction over the dispute—then the parties have agreed that the arbitral tribunal has the authority to resolve disputes as to arbitrability. The D.C. Circuit mistakenly concluded that under the Agreement Between the Government of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments (the "Treaty"), the arbitral tribunal here lacked authority to resolve objections to its own jurisdiction, because a particular prerequisite to arbitration—a requirement to litigate the dispute in the local courts for no more than eighteen months—placed a "temporal limitation" on the parties' agreement to arbitrate.

That conclusion was error. By its plain terms, the Treaty incorporated the UNCITRAL Rules, which explicitly vest such decisions in arbitrators. Those rules reflect the wish of parties to international agreements to resolve their disputes through neutral arbitral forums, rather than through the state courts of an adverse party. Interpreting such provisions, consistent with their plain language, to delegate to arbitrators the authority to resolve all disputes (including those involving their own jurisdiction) advances important interests in certainty and efficiency. Parties entering international arbitration agreements have relied on those precedents as a reflection of the settled understanding that U.S. law respects the parties' choice to delegate to the arbitral

tribunal the authority to resolve objections to its jurisdiction.

The D.C. Circuit's decision is likely to have profoundly negative consequences on the state of international arbitration in the United States. By deviating from well established precedent, the court's decision calls into question all delegations of authority to the arbitrators to determine whether preconditions to arbitration have been satisfied, and will encourage ancillary litigation undermining interests in the efficient resolution of disputes. Moreover, the D.C. Circuit's decision may have deleterious implications for the United States' status as a site for international arbitrations.

ARGUMENT

I. The D.C. Circuit's Decision Conflicts with Longstanding Precedent and Ignores the Clear and Unmistakable Evidence that the Parties Agreed to Submit Arbitrability Questions to the Arbitral Tribunal

Arbitration is fundamentally "a matter of contract," and accordingly, "courts must 'rigorously enforce' arbitration agreements according to their terms." *Am. Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (quoting *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985)). In policing the parties' agreement and the division of labor between courts and arbitrators, two lines of cases have developed. The D.C. Circuit's decision runs against both.

First, this Court has made clear that not every "potentially dispositive gateway question" of arbitrability is to be decided by a court. *Howsam* v.

Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002).[2] For a broad category of "'procedural questions which grow out of the dispute and bear on its final disposition,'" "parties would likely expect that an arbitrator would decide the gateway matter," and thus the question of arbitrability is presumptively for the arbitrator to resolve.[3] *Id.* at 84.

Second, in *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938 (1995), this Court held that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* at 944. The parties here, by their choice of arbitral rules, did make such an agreement. Pet. App. 94a–97a. The D.C. Circuit's opinion uses a newfound "temporal limitation," Pet. App. 13a, to deprive that agreement of meaning.

The D.C. Circuit's decision disregards both lines of cases, ignoring both that prerequisites to arbitration (like the local-litigation requirement at issue in this case) are procedural issues presumptively reserved

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[2] See also *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 557 (1964) ("Once it is determined * * * that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.").

3 This type of gateway issue, which the court has called "issues of procedural arbitrability," includes "allegation[s] of waiver, delay, or a like defense to arbitrability," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983), and "whether prerequisites [to arbitrability] such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met." *Howsam*, 537 U.S. at 85 (emphasis in original).

for the arbitral tribunal's determination and that the parties here clearly and unmistakably delegated to the arbitral tribunal the authority to determine whether prerequisites to arbitration have been satisfied.[4]

A. Incorporation of the UNCITRAL Rules Constitutes Clear and Unmistakable Evidence that the Parties Agreed to Have the Arbitral Tribunal Decide Objections to Arbitral Jurisdiction

Whether the satisfaction of a litigation pre-condition is an issue of "substantive" or "procedural" arbitrability under *Howsam* and *John Wiley* is immaterial when the parties agreed to arbitrate arbitrability. The D.C. Circuit failed to give effect to the parties' agreement that any arbitration would be pursuant to the UNCITRAL Rules and that under those rules, the arbitral tribunal would determine all questions of arbitrability. As explained below, acceptance of the UNCITRAL Rules (or comparable rules of other international and domestic arbitral organizations) provides "clea[r] and unmistakeabl[e]"

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[4] It is important to note what this case is not. Whether the parties agreed to arbitrate is not in question: there is no allegation that Argentina lacked capacity to enter into the Treaty, that Argentina did not sign the Treaty, or that there was not complete consent to arbitrate. Thus, there is no substantive "question of arbitrability" for a court to determine. And there is no dispute that the parties agreed to submit disputes over foreign investments to arbitration. Argentina's ratification of the Treaty constituted an open offer to arbitrate disputes with certain British investors, and BG Group's submission of this dispute to arbitration was an acceptance of Argentina's open offer to arbitrate. See Pet. Br. 20–21 n.8.

evidence that the parties have agreed to arbitrate questions of arbitrability.

1. Parties Agree to International Arbitration to Avoid the Risk of Appearing in the Courts of the Other Party

When parties from different nations enter into "trans-border" contracts or treaties, "the parties' differing nationalities are an obstacle to their voluntary submission to mutually trusted courts." William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 Tul. L. Rev. 647, 699-705 (1989). The distinct cultures and rules of law of their respective countries often lead "[p]arties to international agreements [to] be concerned that the national courts in the country of a party with whom they are contracting may have an instinctive, or even a manifest, bias." Thomas H. Oehmke, *Arbitrating International Claims – At Home and Abroad*, 81 Am. Jur. *Trials* § 6 (originally published in 2001). To level the playing field, trans-border contracts typically include a voluntary, agreed-upon mechanism for dispute resolution—a binding arbitration clause. Binding international arbitration offers a "neutrality of forum and delocalized procedure [that] provide[s] a means of avoiding the 'hometown justice' of the other party's judicial system," Park, 63 Tul. L. Rev. at 702, and protects parties from the injustice of a hostile forum.[5]

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[5] See also S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. Pa. J. Int'l L. 1, 81 (2008) ("With arbitration came a

The D.C. Circuit failed to credit the parties' expressed desire to resolve disputes in a neutral forum. To be sure, the condition precedent in the Treaty at issue here requires a party to litigate the dispute for at least 18 months in the host State's courts. But agreeing to a litigation condition precedent is one thing; agreeing to submit the question of whether that condition has been satisfied to a foreign court—something the parties here emphatically did not do and affirmatively sought to avoid—is another.[6] The parties' common intent was to agree on arbitration in order to avoid state courts who they perceive as being potentially predisposed

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number of collateral benefits for international actors. For example, parties to an arbitration not only avoid the biases of national courts, they also avoid procedural quirks that might give one party a home court advantage."); Oehmke, 81 Am. Jur. *Trials* § 6 (concern about bias "is compounded by distance and the disadvantages one party faces when consenting to resolve a dispute on their opponent's home court. For these reasons, the national courts in the country of one party may be unsuitable to other parties.").

[6] In an analogous situation requiring an evaluation of conditions precedent, it is commonplace that the decision of whether a party sufficiently exhausted administrative remedies is not to be made by the agency providing such remedies, but by the court where the ultimate issue would be decided. Cf. *Jones* v. *Bock*, 549 U.S. 199, 219 (2007) (finding that the lower court on remand should "in the first instance * * * determine the sufficiency of the [petitioner's] exhaustion" in the case); *Patsy* v. *Bd. of Regents of State of Fla.*, 457 U.S. 496, 501 (1982) (noting that it is up to the court to determine whether exhaustion is required in the first place). By extension, the decision of whether a party exhausts litigation conditions precedent should not be made by the court, but by the arbitral tribunal that is vested with the authority to determine the merits of the underlying dispute.

toward local nationals or, in this case, the state itself. At a minimum, the question of arbitrability under such circumstances is one "where parties would likely expect that an arbitrator would decide the gateway matter." *Howsam*, 537 U.S. at 84. It is clear that parties that affirmatively act to incorporate the UNCITRAL Rules (or analogous rules) into their arbitration agreements *expect* that arbitrators will determine arbitrability.

2. The Plain Language of the UNCITRAL Rules, and the Rules of the Major International Arbitral Institutions, Vests Arbitrators with Authority to Decide Jurisdictional Issues

The UNCITRAL Rules, the ICC Rules, and the rules of other major international arbitral organizations, each include provisions that expressly delegate to the arbitral tribunal the authority to determine *any* and *all* jurisdictional challenges.

Article 21(1) of the UNCITRAL Rules—the very provision at issue here—explicitly provides that "[t]he arbitral tribunal *shall* have the power to rule on objections that it has no jurisdiction, including *any* objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement."[7]

Like the UNCITRAL Rules and, indeed, all of the major institutional international arbitration rules, the ICC International Court of Arbitration[8] also

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[7] United Nations Comm'n on Int'l Trade Law Rules, art. 21(1) (2010) (emphasis added).

[8] The ICC International Court of Arbitration is the ICC's international arbitration body and is the world's leading

emphatically recognizes that resolution of jurisdictional disputes by arbitrators is necessary to stabilize international commercial arbitration. The ICC Rules "define and regulate the conduct of cases submitted to the International Court of Arbitration of the ICC. In choosing to follow these rules, parties involved in international business transactions are assured of a neutral framework for the resolution of cross-border disputes."[9] To further that goal, Article 6.5 of the ICC Rules provides that "*any* decision as to the jurisdiction of the arbitral tribunal, except as to parties or claims with respect to which the [ICC] Court decides that the arbitration itself cannot proceed, *shall* be taken by the arbitral tribunal itself."[10] Arbitral rules from other international arbitration bodies contain similar mandates.[11]

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institution for international commercial arbitration. See, *e.g.*, Dr. Loukas Mistelis, *International Arbitration Corporate Attitudes and Practices - 12 Perceptions Tested: Myths, Data and Analysis Research Report*, 15 Am. Rev. Int'l Arb. 525, 562 (2004) (survey respondents "ranked the ICC as the most important [international arbitration] institution").

[9] ICC Rules of Arbitration, *available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/ (last visited Aug. 27, 2013).

[10] ICC Rules of Arbitration, art. 6.5 (emphasis added).

[11] See, *e.g.*, Am. Arbitration Ass'n, Commercial Arbitration Rules and Mediation Procedures § R-7 (2009) ("[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including *any* objections with respect to the existence, scope or validity of the arbitration agreement.") (emphasis added); Int'l Ctr. for Dispute Resolution, International Dispute Resolution Procedures art. 15.1 (2009) ("The tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."); London Court of Int'l Arbitration Rules art. 23.1

The purpose of these widely adopted provisions is clear:

> The fear of bias in a foreign counter-party's home court can be ameliorated to some extent contractually by inclusion of a well-drafted arbitration clause. Through this mechanism contracting parties may select a neutral and impartial forum so that any dispute will be resolved by a tribunal composed of individuals in whom confidence is vested (see the rules of

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(1998) ("[t]he Arbitral Tribunal shall have the power to rule on its own jurisdiction including *any* objection to the initial or continuing existence, validity or effectiveness of the Arbitration Agreement.") (emphasis added); Singapore Int'l Arbitration Ctr., Arbitration Rule 25.2 (2010) ("The Tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, termination or validity of the arbitration agreement."); China Int'l Econ. & Trade Arbitration Comm'n, Arbitration Rules, ch. I, art. 6.1 (2012) ("CIETAC shall have the power to determine the existence and validity of an arbitration agreement and its jurisdiction over an arbitration case. CIETAC may, where necessary, delegate such power to the arbitral tribunal."); World Intellectual Prop. Org., WIPO Arbitration Rules art. 36 (2009) ("(a) The Tribunal shall have the power to hear and determine objections to its own jurisdiction, including any objections with respect to form, existence, validity or scope of the Arbitration Agreement examined pursuant to Article 59(c). * * * (e) A plea that the Tribunal lacks jurisdiction shall not preclude the Center from administering the arbitration."); see also Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 41(2), 17 U.S.T. 1270, 575 U.N.T.S. 159 (Mar. 18, 1965) ("Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.").

> arbitration institutions such as International Chamber of Commerce Rules, Article 7(1), London Court of International Arbitration Rules, Articles 5.2 and 6, American Arbitration Association Rules, Article 7 and United Nations Commission on International Trade Law Model Law Article 12).

Michael S. Greco & Ian Meredith, *Getting to Yes Abroad Arbitration as a Tool in Effective Commercial and Political Risk Management*, 16 Bus. L. Today 4, at 23–24 (March/April 2007) (abbreviations omitted). By incorporating UNCITRAL Rule 21, the Treaty clearly vested the arbitral tribunal with the authority to decide its own jurisdiction.[12] The D.C. Circuit erred in failing to recognize the parties' expression of their intent.

3. Well Reasoned Lower Federal Court Decisions Have Held that Parties' Incorporation of the UNCITRAL Rules (or Similar Arbitral Rules) Clearly and Unmistakably Shows the Parties' Intent for the Arbitral Tribunal to Determine Jurisdictional Questions

The parties' decision to incorporate the UNCITRAL Rules into the Treaty satisfies the *First Options* test by manifesting a "clear and

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[12] The ICC Rules also espouse the internationally accepted doctrine of competence-competence (that the arbitral tribunal has the authority to determine its jurisdiction) and comport with this Court's dictum in *First Options*. See W. Laurence Craig, William W. Park, & Jan Paulsson, *International Chamber of Commerce Arbitration*, 3d ed. § 28.07(iii) (2000). The same is true for the rules of the other major arbitral organizations. See generally note 12, *supra* (quoting rules).

unmistakable" agreement to vest the arbitral tribunal with the authority to determine whether jurisdictional requirements have been met—certainly including whether the claimant has fulfilled conditions precedent to arbitration. By concluding otherwise, the D.C. Circuit's decision conflicts with a large body of cases from other federal courts.

The lower federal courts routinely have held that parties' decision to incorporate the UNCITRAL Rules,[13] the ICC Rules,[14] or the AAA Rules[15] satisfies

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[13] See, *e.g.*, See *Oracle Am., Inc.* v. *Myriad Grp. A.G.*, ___ F.3d ___, No. 11-17186, 2013 WL 3839668, at *7 (9th Cir. July 26, 2013) ("Incorporation of the UNCITRAL arbitration rules into the parties' commercial contract constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."); *Schneider* v. *Kingdom of Thailand*, 688 F.3d 68, 72 (2d Cir. 2012) (reaffirming that explicit incorporation of UNCITRAL rules serves as clear and unmistakable evidence); *Thai-Lao Lignite (Thailand) Co.* v. *Gov't of Laos*, 492 F. App'x 150, 151 (2d Cir. 2012) (same), *cert. denied*, 133 S.Ct. 1473 (2013); *Republic of Ecuador* v. *Chevron Corp.*, 638 F.3d 384, 394 (2d Cir. 2011) (explaining that Ecuador's agreement to resolve investment disputes under the UNCITRAL rules constituted clear and unmistakable evidence to have arbitrability issues decided by the arbitral tribunal).

[14] *Shaw Group Inc.* v. *Triplefine Int'l Corp.*, 322 F.3d 115, 124-125 (2d Cir. 2003) (recognizing that agreement providing that all disputes would be arbitrated under ICC rules was clear and unmistakable evidence of "the parties' intent to arbitrate questions of arbitrability"); *Apollo Computer, Inc.* v. *Berg*, 886 F.2d 469, 473 (1st Cir. 1989) (holding, before *First Options*, that by agreeing that arbitration would occur in accordance with the ICC Rules, parties delegated decisions about arbitrability, including "disputes involving the existence and validity of a prima facie agreement to arbitrate," to the arbitrator); *Burnham Enters., LLC* v. *DACC Co. Ltd.*, No. 2:12-CV-111-WKW, 2013 WL 68923, at *4 (M.D. Ala. Jan. 7, 2013) ("Here the language of the arbitration agreement, coupled with the [ICC] rules it

First Options' requirement of "clear[] and unmistakabl[e]" evidence of the parties' intent to submit gateway questions of arbitrability to arbitration. These decisions reflect a clear recognition of the authority of arbitrators to determine their jurisdiction, see generally Section

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adopts by reference, provide clear and unmistakable evidence that [the parties] agreed to have questions of arbitrability settled in arbitration, not in court."); *Sonera Holding B.V.* v. *Cukurova Holding A.S.*, 895 F. Supp. 2d 513, 521 (S.D.N.Y. 2012) (concluding that parties' agreement to arbitrate pursuant to ICC Rules was clear and unmistakable evidence that questions of arbitrability should be determined by the International Court of Arbitration).

[16] See, *e.g.*, *Petrofac, Inc.* v. *DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012) ("the express adoption of [AAA] rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability"); *Fallo* v. *High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) ("The arbitration provision's incorporation of the AAA rules * * * constitutes a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator."); *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006) (agreeing with the Second Circuit in *Contec Corp.* v. *Remote Solution, Co.*, 398 F.3d 205, 208 (2d Cir. 2005), that incorporation of the AAA rules provides clear and unmistakable proof of the parties' intent to have the arbitrator determine questions of arbitrability); *Terminix Int'l Co.* v. *Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005) (same); *Contec*, 398 F.3d at 208 ("[W]hen, as here, parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrabilit[y] the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator."). But see *Riley Mfg. Co.* v. *Anchor Glass Container Corp.*, 157 F.3d 775, 780 (10th Cir. 1998) (finding that the parties' reference to AAA rules in arbitration provision did not mean that the parties specifically intended to have the arbitrator determine questions of arbitrability).

I.A.2., *supra* (delineating rules). The D.C. Circuit's decision erroneously cuts against this well reasoned body of jurisprudence.

4. Parties that Rely on International Arbitration Rules Intentionally Submit Questions of Arbitrability to Arbitrators and Not Courts

Parties to investment agreements and trans-border contracts of the sort at issue here typically are large corporations or sovereign states. Such parties are sophisticated and well counseled about the implications of their agreements. When such parties agree to have potentially multimillion-dollar disputes decided in accord with the UNCITRAL Rules, and thus agree that "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement," Article 21(1), the only logical conclusion is that they intended to submit all jurisdictional disputes to the arbitrators—including whether the parties satisfactorily fulfilled a litigation condition precedent to arbitration.

It is counterintuitive to suppose that such sophisticated parties intended to submit the decision whether litigation preconditions to arbitration have been satisfied to an unknown court in a still-unknown state, while vesting the arbitrators with authority to resolve them substantively. Cabining the "temporal limitation" to litigation preconditions would also create a confusing, dual-track system that treats litigation conditions precedent differently than

other preconditions, including challenges to requirements to negotiate or mediate.

Thus, the D.C. Circuit's opinion drains of meaning both the express language of arbitral rules—including UNCITRAL Rule 21 and ICC Rule 6.5—and the intent of the parties that incorporate those rules into their arbitration agreements.

B. The Settled Understanding that Incorporating the UNCITRAL Rules Delegates Jurisdictional Questions to Arbitrators Serves Important Interests

This well accepted understanding that the incorporation of specific arbitral rules delegates to arbitrators the authority to determine their own jurisdiction—including the authority to determine whether conditions precedent to arbitration have been satisfied—serves essential functions. It clearly and efficiently allocates authority between arbitrators and courts: Parties understand that by choosing to incorporate the UNCITRAL Rules, the ICC Rules, or analogous arbitration rules, they have agreed to the arbitrators' authority to determine questions of arbitrability, even in multi-step arbitration agreements. Arbitral institutions such as the ICC International Court of Arbitration, and their users, rely on the fundamental principle that arbitrators have the ability to determine questions of arbitrability. Continued certainty as to the validity of the parties' agreement to arbitrate arbitrability is important to the business community. Adriana Dulic, *First Options of Chicago, Inc. v. Kaplan and the Kompetenz-Kompetenz Principle*, 2 Pepp. Disp.

Resol. L.J. 77, 96 (2002) ("Certainty is crucial to the vitality of the business community.").

This rule also furthers interests in efficiency by eliminating the need for separate lawsuits and motions to compel arbitration. Vesting the arbitrators with authority to determine their jurisdiction ensures that the arbitrators' determination on arbitrability receives a deferential review by U.S. courts, consistent with the understanding that the parties have chosen to resolve all their disputes by arbitration.[16] Regardless of the D.C. Circuit's view of the demerits of the arbitral tribunal's decision, "the parties 'bargained for the arbitrator[s'] construction of their agreement,'" meaning "an arbitral decision 'even arguably construing or applying the contract' must stand." *Oxford Health Plans LLC* v. *Sutter*, 133 S. Ct. 2064, 2068 (2013) (quoting *E. Associated Coal Corp.* v. *United Mine Workers of Am.*, 531 U.S. 57, 62 (2000)).

II. The D.C. Circuit's Holding that the Treaty's Incorporation of the UNCITRAL Rules Had a "Temporal Limitation" Wreaks Havoc on the Settled Expectation that Use of Specific Arbitral Rules Delegates Jurisdictional Issues to Arbitrators

The D.C. Circuit's "temporal limitation" reasoning is so broad that it introduces uncertainty into *all* conditions precedent to arbitration—not just

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[16] See 9 U.S.C. § 10(a); *First Options*, 514 U.S. at 943 (when an arbitrability question is properly submitted to the arbitrator, "the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances").

litigation requirements like the one at issue here. The D.C. Circuit conceded that "once the possibility of arbitration is triggered," the Treaty's "incorporation of the UNCITRAL Rules provides 'clear[] and unmistakabl[e] evidence[]' that the parties intended for the arbitrator to decide questions of arbitrability." Pet. App. 13a-14a (quoting *AT & T Techs., Inc.* v. *Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986), and citing *First Options*, 514 U.S. at 944). But the court nonetheless concluded that the Treaty's incorporation of the UNCITRAL Rules was subject to a "temporal limitation"—"the Rules are not triggered" until petitioner had first sought recourse in Argentine courts for at least eighteen months. *Id.* at 14a. In other words, the prerequisite to arbitration was not part of the agreement to arbitrate disputes, and because the litigation requirement fell outside the scope of the arbitration agreement or the arbitration rules, the court—not the arbitrator—had the authority to determine whether the prerequisite was satisfied such that arbitration was triggered.

Under the foregoing circumstances, to hold that a condition precedent to arbitration is *not* part of the arbitration agreement itself is logically inconsistent. The D.C. Circuit's "temporal limitation" reasoning introduces uncertainty into *all* arbitration agreements that include conditions precedent and threatens the validity of *all* agreements in which the parties contracted to arbitrate threshold jurisdictional questions.

A. The D.C. Circuit's Holding Affects All Prerequisites to Arbitration in All Arbitration Agreements

Many arbitration agreements and international investment treaties, not just bilateral investment treaties, include prerequisites to arbitration other than local litigation requirements. See Int'l Bar Ass'n, IBA Guidelines for Drafting International Arbitration Clauses ¶86 (2010) ("It is common for dispute resolution clauses in international contracts to provide for negotiation, mediation or some other form of alternative dispute resolution as preliminary steps before arbitration."); Campbell McLachlan et al., *International Investment Arbitration: Substantive Principles* ¶¶3.01–3.32 (2007). These multi-step arbitration clauses often include prerequisites that the parties must complete before initiating arbitration. Such prerequisites include requirements that the parties participate in mediation or amicable negotiations, submit the claim to a dispute review board, or observe a mandatory cooling off period before arbitration can begin.[17]

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[17] See Kathleen M. Scanlon, *Drafting Dispute Resolution Clauses* 2.1.2 (2006) ("Negotiation and mediation are commonly used before the parties resort to arbitration or litigation."); Jack J. Coe, Jr., *International Commercial Arbitration: American Principles and Practice in a Global Context* 2.3.2 (1997) (explaining that dispute resolution boards are gaining acceptance); Christopher F. Dugan, et al., *Investor-State Arbitration* 117 (2008) (noting that many bilateral investment treaties provide for cooling off periods that allow for consultation, amicable negotiation, or pursuing local remedies prior to the dispute being submitted to arbitration).

The D.C. Circuit's decision adversely affects all prerequisites to arbitration. There is no principled distinction between the local-litigation requirement at issue in this case and myriad other prerequisites to arbitration that are commonly used in multi-step arbitration provisions. The local-litigation requirement is nothing more than a particular type of pre-arbitration process submitted through a particular procedure. The precondition to arbitration at issue in *John Wiley*, which involved an arbitration agreement with a similar multi-step process, illustrates the lack of distinction. Pursuant to the collective bargaining agreement at issue in *John Wiley*, the parties had to submit the dispute to two separate conferences before initiating arbitration.[18] That process is conceptually similar to multi-step arbitration clauses used in international commercial agreements in that it required the parties to perform certain actions that could resolve the dispute before resorting to arbitration. In *John Wiley*, the arbitrator decided whether the two prerequisite steps had been satisfied, and this Court upheld the arbitrator's authority to make that determination; there was no indication that a court was required to determine whether those two steps had occurred, on the theory

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[18] The fact that *John Wiley* took place in the labor-relations context is irrelevant. The multi-step prerequisites at issue there could just as easily be contained in an international arbitration agreement as a collective bargaining agreement. Moreover, this Court has cited *John Wiley* in the context of commercial arbitration without any indication that its relevance is limited to labor arbitrations. See *Howsam*, 537 U.S. at 592 (explaining that *John Wiley* held "that an arbitrator should decide whether the first two steps of a grievance procedure were completed, where these steps are prerequisites to arbitration").

that arbitration was not "triggered" (Pet. App. 14a) until they had.

Nor can the D.C. Circuit's reasoning be limited to bilateral investment treaty ("BIT") arbitrations. As the Second Circuit noted in *Republic of Ecuador* v. *Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011), whether the party is a party to a BIT or an investor utilizing the dispute framework provided by the BIT is a "distinction without a difference." *Id.* at 392. A "separate binding agreement to arbitrate" exists between the State and the investor because the State signed the BIT submitting disputes to arbitration and the investor consented to arbitrate. *Ibid.* A State's "accession to the Treaty constitutes a standing offer to arbitrate," and "a foreign investor's written demand for arbitration completes the 'agreement in writing' to submit the dispute to arbitration." *Id.* at 392-393. As a result, an arbitration agreement under a BIT is identical to a non-BIT arbitration agreement.

The applicable arbitration rules and their mandate that the arbitral tribunal determine issues of arbitrability are identical in both BIT and non-BIT cases. See Section I.A.2., *supra* (quoting arbitration rules). See generally U.S. Amicus Br. 2-3 (May 10, 2013) (acknowledging that BITs "contemplate dispute resolution according to the rules of other arbitral institutions and before ad hoc arbitral tribunals convened under the [UNCITRAL] Rules."). No authority exists for treating the identical text of the applicable rules differently in BIT and non-BIT contexts. It therefore is impossible to restrict the temporal limitation to BIT disputes. The D.C. Circuit erred in suggesting its holding was applicable only to the BIT agreement before it. See Pet. App. 18a–20a.

B. The D.C. Circuit's Decision Will Increase Judicial Challenges to Arbitration Based on a Party's Alleged Failure to Meet Preconditions to Arbitration

The D.C. Circuit's rationale necessarily applies to any arbitration clause that provides a condition precedent to arbitration.[19] As a result, the decision below creates a weapon to obstruct arbitration through ancillary litigation.

At the inception of arbitration, federal courts could be subject to a rash of actions seeking to enjoin arbitration proceedings on the ground that preconditions for triggering arbitration have not been satisfied. Federal courts also would be forced to entertain judicial challenges at the post-award stage when parties challenge the validity of an arbitral award on the ground that a condition precedent was not met prior to its issuance. The D.C. Court's decision provides dissatisfied parties the ability to have a second bite at the apple, allowing them to see how they fare in arbitration and only then invoking a supposedly unmet condition precedent to challenge an adverse award.

Thus, the D.C. Circuit's ruling significantly increases the potential for dilatory challenges to arbitration and arbitral awards, and it opens the way

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[19] The D.C. Circuit's reasoning supporting its finding of a "temporal limitation" would permit a party opposing arbitration to argue that the determination of whether *any* precondition to arbitration has been satisfied must be reserved to the courts—after all, any precondition to arbitration is effectively a temporal limitation that pushes back the inception of the actual arbitration process.

for arbitration to become bogged down in years of pre- or post-award litigation by parties seeking to undermine their arbitration agreements. These lawsuits would drive up the costs to the party seeking enforcement and frustrate the purpose of arbitration of providing swift and final resolution of disputes at lower cost.

Such ancillary litigation is contrary to the "emphatic" federal policy favoring international arbitration. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 US 614, 631 (1985). It is also contrary to well established precedent that permits an award to be set aside only in narrow circumstances where arbitral awards violate public policy. When a party seeks to confirm an arbitral award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), "[t]he court *shall* confirm the award unless it finds one of [seven exclusive] grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207. Chapter II of the Federal Arbitration Act ("FAA") incorporates the pro-enforcement New York Convention into law. As such, arbitral awards are enforced by U.S. Courts except in exceedingly narrow circumstances[20]—none of which justifies vacatur of the arbitral award.

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[20] See, *e.g.*, *Hall St. Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 584 (2008) (Section 10 of the FAA provides "exclusive grounds" for expedited vacatur of an arbitral award); *Zeiler* v. *Deitsch*, 500 F.3d 157, 164 (2d Cir. 2007) (noting that the party opposing enforcement of an arbitral award has a heavy burden, "as the showing required to avoid summary confirmance is high"); *Yusuf Ahmed Alghanim & Sons, W.L.L.* v. *Toys "R" Us,*

III. The D.C. Circuit's Decision Threatens to Undermine the United States' Position as a Preferred Forum for International Arbitration

The D.C. Circuit's recognition of a "temporal limitation," Pet. App. 13a, places it outside of the mainstream of other jurisdictions and threatens the nation's reputation as a favored forum for international arbitration. By espousing an unprecedented temporal limitation, the D.C. Circuit's decision contravenes established precedent, see Section I.A.3., *supra*, and thereby tarnishes the United States' reputation as a desirable non-interventionist forum. The decision also contravenes the policies established in *Mitsubishi Motors* and "subvert[s] the spirit of the United States' accession to the [New York] Convention," 473 U.S. at 636, 639 n.21, by impermissibly supplanting the arbitral tribunal's construction of the parties' agreement with that of the D.C. Circuit.

Inc., 126 F.3d 15, 19 (2d Cir. 1997) ("Under the Convention, the district court's role in reviewing a foreign arbitral award is strictly limited."); *M & C Corp.* v. *Erwin Behr GmbH & Co.*, 87 F.3d 844, 848 (6th Cir. 1996) (judicial review of an international arbitral award is "extremely limited" and governed by the New York Convention); see also Kristina L. Morrison, *A Misstep in U.S. Arbitral Law: A Call for Change in the Enforcement of Nondomestic Arbitral Awards*, 46 Tort Trial & Ins. Prac. L.J. 803, 827 (2011).

A. The D.C. Circuit's Decision Will Deter Parties from Selecting the United States as an International Arbitration Forum, Just as *Metalclad* Did for Canada

Since its release, the D.C. Circuit's decision has provoked scrutiny and criticism, with experts positing that the "interpretation of the scope of the arbitral tribunal's competence is out of line with most international authority and a dangerous precedent for both investment and commercial arbitration." Sebastian Perry, *BG Group v Argentina – a Dallah for the US?*, Global Arb. Rev. (Jan. 27, 2012) (quoting Gary Born).[21] See also Carolyn B. Lamm & Eckhard R. Hellbeck, *US Court Vacates BG Group's Investment Treaty Award – Argentina* v. *BG Group Plc*, 15 Int'l Arb. L. Rev. N-14, N-18 (2012) (the D.C. Circuit decision "may significantly affect Washington D.C.'s standing as a seat of international arbitration").

This outcry recalls the scholarly criticism that erupted in response to the Canadian case *United Mexican States* v. *Metalclad Corporation*, 2001 B.C.S.C. 664 (Can. B.C. S.C.). In *Metalclad*, the British Columbia Supreme Court partially vacated an award issued against Mexico under the North American Free Trade Agreement. The *Metalclad* decision precipitated a backlash against Canada as an arbitral forum, ith one commentator recognizing that the case provides "an example of why it is inappropriate for a national court to enter upon matters of international law when reviewing an

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[21] *Available at* http://globalarbitrationreview.com/news/article/30124/bg-group-vargentina-8211-dallah-us.

international arbitral decision."[22] After *Metalclad*, parties engaged in international arbitration resisted Canada as a forum by citing an overly active judiciary.[23]

Metalclad serves as a warning of what likely will come should the D.C. Circuit's decision stand. The immediate criticism of the D.C. Circuit's decision suggests that it starts the United States down the same path that the *Metalclad* decision led Canada—one with a broader effect than stinging academic criticism, and one with a foreseeable impact on U.S. international arbitration. If *Metalclad* is any indication, it follows that the D.C. Circuit's decision, should it stand, will diminish the United States' position as a preeminent destination for international arbitration.

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[22] David Williams, *Challenging Investment Treaty Arbitration Awards—Issues Concerning the Forum Arising from the Metalclad Case*, 4 Bus. L. Int'l 156, 166, 168 (May 2003).

[23] See, *e.g.*, Decision of the Tribunal on the Place of Arbitration at ¶ 8, *United Parcel Serv.* v. *Canada*, NAFTA (UNCITRAL) (Oct. 17, 2001), *available at* www.naftaclaims.com/disputes_canada_ups.htm; Decision on the Place of Arbitration at ¶22, *Merrill & Ring Forestry L.P.* v. *Canada*, NAFTA (UNCITRAL) (Dec. 13, 2007), *available at* www.naftalaw.org/disputes_canada_merrill&ring.htm; Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings at ¶ 24, *Canfor Corp.* v. *United States*, NAFTA (UNCITRAL) (Jan. 23, 2004), *available at* www.naftalaw.org/disputes_us_canfor.htm.

B. The D.C. Circuit's Decision Runs Contrary to the Doctrine of Non-Parochialism Espoused in *Mitsubishi Motors*

Issues of non-arbitrability must be interpreted narrowly to prevent local parochialism from undermining the validity of international arbitral awards. *Mitsubishi Motors* reinforced the "emphatic federal policy in favor of arbitral dispute resolution," cautioned that "it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration" and mandated enforcement of the "agreement to arbitrate * * * in accord with the explicit provisions of the Arbitration Act." 473 U.S. at 631, 639-640 (citing *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 (1974)).

As this Court noted in *Scherk*, "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would * * * invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." 417 U.S. at 516-517. Parochialism "would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." *Id.* at 517. It also would undermine the purpose of the New York Convention "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Id.* at 520 n.15 (citing Convention on the Recognition and En-

forcement of Foreign Arbitral Awards, S. Exec. Doc. E, 90th Cong., 2d Sess. (1968); Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049 (1961)).

The D.C. Circuit's decision reflects a parochial refusal to enforce the arbitral tribunal's well reasoned order that conferred jurisdiction upon itself and settled the dispute between BG Group and Argentina. It should be overturned as contrary to this Court's precedent, the intent of the parties, and the interests of the United States as a leading seat for international arbitration.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted.

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